

1997

Mark Andrew Larson v. Karin Sofia Ohlander : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Brian C. Harrison; Attorney for Appellee; Lorie Fowlke; Jeffs and Jeffs; Guardian Ad Litem.

Daniel F. Bertch; Kevin K. Robson; Bertch and Birch; Attorney for Appellant.

Recommended Citation

Brief of Appellant, *Larson v. Ohlander*, No. 970375 (Utah Court of Appeals, 1997).
https://digitalcommons.law.byu.edu/byu_ca2/932

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

**UTAH COURT OF APPEALS
BRIEF**

UTAH
DOCUMENT
K F U
50

.A10
DOCKET NO. 970375-CA

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

MARK ANDREW LARSON,

Plaintiff/Appellee,

v.

KARIN SOFIA OHLANDER,

Defendant/Appellant.

ADDENDUM TO APPELLANT'S BRIEF

Priority No. 4

Appeal No. 970375-CA

Daniel F. Bertch (4728)
Kevin K. Robson (6976)
BERTCH & BIRCH
5296 South 300 West, Suite 100
Salt Lake City, UT 84107
Attorneys for Appellant

Brian C. Harrison
3319 North University, #200
Provo, UT 84604
Attorney for Appellee

Lorie Fowlke
JEFFS & JEFFS
90 North 100 East
Provo, UT 84601
Guardian Ad Litem

FILED

OCT - 9 1997

COURT OF APPEALS

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

MARK ANDREW LARSON,

Plaintiff/Appellee,

v.

KARIN SOFIA OHLANDER,

Defendant/Appellant.

ADDENDUM TO APPELLANT'S BRIEF

Appeal No. 970375-CA

Daniel F. Bertch (4728)
Kevin K. Robson (6976)
BERTCH & BIRCH
5296 South 300 West, Suite 100
Salt Lake City, UT 84107
Attorneys for Appellant

Brian C. Harrison
3319 North University, #200
Provo, UT 84604
Attorney for Appellee

Lorie Fowlke
JEFFS & JEFFS
90 North 100 East
Provo, UT 84601
Guardian Ad Litem

TABLE OF CONTENTS

Order of Sandviken District Court (11/2/92)	A
Order of Court of Appeal for South Norrland (12/18/92)	B
Order and Judgment of United States District Court for Utah (6/12/95)	C
Swedish Supreme Administrative Court Judgment (12/20/95)	D
Fourth District Court Findings of Fact and Conclusions of Law (5/14/97)	E
<i>Ohlander v. Larson</i> , 114 F.3d 1531 (10 th Cir. 1997)	F

Tab A

SANDVIKEN DISTRICT COURT

**MINUTES OF PRELIMINARY
HEARING**

in Sandviken on
2nd November 1992

T 33/91

Annex: 30

THE COURT

Deputy District Judge Johan Alvner

KEEPER OF THE MINUTES

Law Clerk Marianne Lindholm

PETITIONER

Karin SOFIA Larson, nat. reg. no. 671029-7505, Grundbogatan 1 E,
S-811 30 SANDVIKEN; present in person
Legal representative: Anita Wallin-Wiberg, Attorney-at-law, Box 1333,
S-801 38 SANDVIKEN; present

RESPONDENT

MARK Andrew Larson, b. 6.11.65, cf 69 E 600 N Provo, Utah 84606, USA;
present in person
Legal representative: Bengt Hennel, Attorney-at-law, Box 244, S-811 23
SANDVIKEN; present

CAUSE

Dissolution of marriage etc.

Bengt Hennel submitted Mark Larson's application for legal aid, Annex 31, and stated as follows. Mark was domiciled in Sweden for about one year at the age of six or seven and then between 1985 and 1987. He cannot afford to retain counsel in Sweden out of his own pocket and there are special grounds for awarding him legal aid.

Anita Wallin Wiberg, presenting Sofia Larson's points of claim, stated as follows. Sofia Larson prays the District Court to make a decree absolute of divorce between the parties by part-judgement and, also on an interlocutory basis, to award her sole custody of their daughter Julia and to order Mark Larson to pay her, as maintenance for the daughter, SEK 1,075 monthly for the period between 1st January and 31st May 1991 and SEK 1,125 monthly from 15th January 1992 and until the child is 18 years old.

Bengt Hennel stated as follows. Mark Larson consents to the request for dissolution of the marriage by part-judgement but contests the custody and

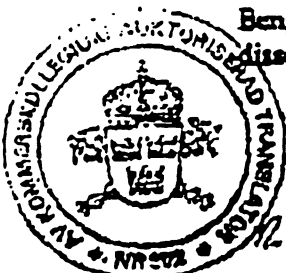


EXHIBIT A

0046

maintenance claims. For his own part, also on an interlocutory basis, Mark Larson in the first instance claims custody of the daughter, Julia, and prays that Sofia Larson be ordered to pay him, as maintenance for their daughter, SEK 1,075 monthly from the day of the District Court's temporary order in the matter until the daughter is 18 years old, and in the second instance, in the event of Sofia being awarded custody of Julia, access to their daughter in the USA for two continuous months annually for the period between 1993 and 1997 and six weeks annually thereafter. Mark Larson confirms Julia's need of maintenance at the standard rate of SEK 1,075 monthly and his own ability to pay maintenance. In the event of custody of the daughter being awarded to Sofia Larson, Mark has discharged his maintenance obligation for the period preceding 15th January 1992.

Anita Wallin Wiberg stated as follows. Sofia Larson contests the custody and maintenance claims. Julia's need of maintenance is confirmed, but Sofia Larson does not have the economic resources to pay maintenance. As regards the custody claim, Sofia Larson consents to Mark Larson being given the opportunity of access to the child, but not to the extent claimed and not in the USA.

Anita Wallin Wiberg stated further as follows. Sofia Larson met Mark Larson, who is a member of the Church of Jesus Christ of Latter-Day Saints, in 1986, while he was living in Sweden. Sofia visited Mark in the USA in 1989 and the couple were married in October 1989. They settled in the USA and their daughter Julia was born in August 1990. After celebrating Christmas in Sweden, Sofia decided to remain there and in January 1991 petitioned for a divorce. In July 1991 Sofia returned to Mark in the USA in a bid to save their marriage, but the relationship was irreparable. Sofia considers Mark temperamental and uncontrolled. He has a violent temper and has hit and kicked Sofia in Julia's presence. Sofia does not wish to leave Mark alone with Julia and fears that Mark could kidnap Julia and take her to the USA. Mark's interest in Julia has grown since Sofia brought their daughter to Sweden. Between July 1991 and January 1992, when Sofia and Julia were living with Mark in the USA, there was a lot of quarrelling and Sofia was forced to leave the USA without telling Mark in advance. Summing up, it is Sofia who, ever since Julia was born, has been mainly responsible for her and is best suited to look after her. Joint custody is not feasible and it is in Julia's best interests for Sofia to be awarded sole custody of her.

Bengt Hannal stated as follows. Sofia left the USA in November 1990. It was agreed that Mark should join her and that they were to celebrate Christmas with Sofia's family in Sweden. Sofia's relatives persuaded her to stay on in Sweden, and Mark was literally thrown out by her family. Evidently one of Sofia's women friends had phoned, saying that Mark intended to kidnap Julia, which was a complete fabrication. When Sofia and Julia returned to the USA in the summer of 1991, everything went well to begin with, but in November 1991 the relationship deteriorated and Sofia returned to Sweden without telling Mark first. Between January and June 1991, Mark contributed towards Julia's upkeep by sending Sofia SEK 5,500. Mark has a monthly income of SEK 12,100 (SEK



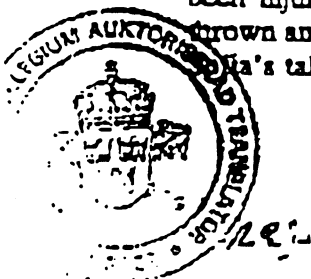
10,400 net). Mark used to have his own flat, but he is now living with his grandmother. Mark works in the optics industry and has plenty of scope for working overtime; this entitles him to time off, over and above the regular two weeks' paid holiday. If Julia comes to the USA, Mark can work half-time and look after her during his leisure. A brother, with a Swedish wife, and three married cousins live in the same city, and so Mark has plenty of help available for looking after Julia. While in Sweden, Mark has been allowed to meet Julia for about 10 hours, always in the presence of Sofia and her relatives. Sofia has no grounds whatsoever for denying him normal access to their daughter, and with Sofia's attitude to the matter of access, it is Mark who is best suited for custody of Julia. Mark is aware that a child needs both its parents and Sofia would be given plenty of opportunity for regular access to Julia. If Sofia is awarded custody of their daughter and Mark access, then, while Julia is still too small to travel on her own, Mark will come to Sweden and collect Julia and will then bring her back to Sweden.

Anita Wallin Wiberg stated as follows. Sofia has not received any financial assistance towards Julia's upkeep. On the other hand she has received money towards her telephone bill and towards the cost of forwarding luggage. As regards the risk of kidnapping, Sofia's chances of recovering her daughter if Mark should keep her in the USA are fairly non-existent. Sofia is currently unemployed. She previously had a temporary teaching job and is now waiting to hear whether she has been accepted for a study programme she has applied for.

Bengt Hannei stated as follows. Mark Larson confirms that Sofia Larson is unemployed.

Sofia Larson stated as follows. While she was living in the USA, Mark had outbursts of rage and threw things, often without her being able to understand why. Mark has struck her and occasionally also kicked her. They differed on many matters, e.g. religion and child education. She returned to the USA because she wanted the relationship to work, but it would not. Mark has never been violent to Julia and now that they have met in Sweden things have gone well. Sofia does not know whether the threat of kidnapping was in earnest, but she does not trust Mark. Mark should be allowed access to Julia but should not be allowed to take her to the USA until Julia is older.

Mark Larson stated as follows. He has always cared about Julia, but distance has made it hard to keep in touch with her. Previously Sofia also prevented him from talking to Julia on the phone. The relationship between himself and Sofia broke down and Sofia was depressed, felt bad and would not speak to her friends or even meet them. There were two occasions when he "struck" Sofia. One of them was a purely reflex movement against Sofia's leg, and the second time was a blow which struck her on the cheek when she "exploded" in the car. Sofia can not have been injured on either of these occasions. He has never kicked her and never thrown anything at her or in such a way that there was a risk of her being struck. Sofia's talk of kidnapping is quite groundless. On the contrary, he has told her



that he would never go off with Julia the way Sofia did when she took Julia and left the USA without telling him first. Sofia and Julia have a good relationship and he wants it to continue. If he is awarded custody, Julia will be allowed to visit Sofia in Sweden.

Anita Wallin Wiberg stated as follows. Sofia Larson consents to Mark Larson being allowed access to Julia three times a year for one week at a time. Access may be exercised in Sofia's home or in some other place on which the parties can agree, but not in the USA.

Anita Wallin Wiberg claimed remuneration in accordance with an expense account, Annex 31, submitted.

The proceedings, having lasted from 11 a.m. to 12.25 p.m., were declared closed with the announcement that a part-judgement and order would be made by being made available in the District Court Office on 13th November 1992 at 2 p.m.

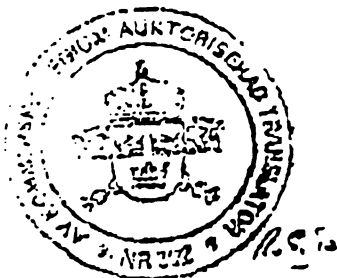
Retiring to chambers, the District Court made a part-judgement and the following

ORDER (to be issued on 13th November 1992 at 2 p.m.).

Until such time as these matters have been determined by a judicial decision having force of law or by a decision to the contrary, the District Court orders as follows.

1. Custody of JULIA Sofia, nar. reg. no. 900813-3929, shall continue to be vested in Sofia Larson, as ordered by the District Court in its temporary order of 10th May 1991.
2. The District Court finds no cause to amend its temporary order of 10th May 1991 in the matter of maintenance, which order shall accordingly remain in force.
3. Mark Larson shall be entitled to access to the daughter, Julia, for one month in the year, at a time to be agreed on in detail between the parties.

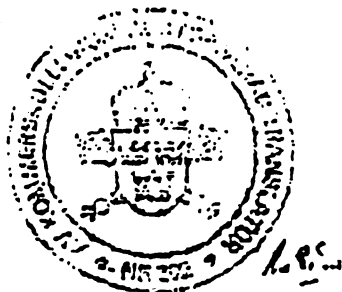
Anita Wallin Wiberg is awarded an advance payment of SEK 9,850 under the Legal Aid Act. In view of the rules concerning payment of legal aid charges, this entire amount shall be disbursed out of public funds.



Any appeal against this order shall be made separately, by limited appeal, not later than 4th December 1992.

Date as above,
(Signature:)
Marianne Lindholm

Record read and approved/ (Initials)
(Stamp:)
SANDVIKEN DISTRICT COURT
For a true copy,
(Signature)



Tab B

**THE COURT OF APPEAL
FOR SOUTHERN NORRLAND**

RECORD OF HEARING
in Sundsvall on
18th December 1992

Sb 8
Annex: 10
Ö 1180/92

THE COURT

Christer Berg, Appellate Court Judge
Gösta Grefberg, Appellate Court Judge Referee
Kristina Bratteberg, Acting Appellate Court Judge

KEEPER OF THE MINUTES

The Referee

VARIOUSLY APPELLANT AND OPPONENT (not present)

Karin SOFIA Larson, nat. reg. no. 671029-7505, Flångatan 4 C,
S-811 39 SANDVIKEN

Legal representative and counsel under the Legal Aid Act: Anita Wallin Wiberg,
Attorney-at-law, Box 1333, S-801 38 GÄVLE

VARIOUSLY APPELLANT AND OPPONENT (not present)

MARK Andrew Larson, b. 6.11.65, citizen of the United States of America, 69
E 600 N Provo, Utah 84606, USA

Legal representative and counsel under the Legal Aid Act: Bengt Hemmel,
Attorney-at-law, Box 244, S-811 23 SANDVIKEN

CAUSE

Temporary order concerning right of access to child etc.

DECISION CONTESTED

Made by the Sandviken District Court on 13th November 1992 in case no. T
33/91.

—
The case being presented by Trainer Deputy Judge Sten Ekstrand, the Court of
Appeal noted as follows.

In her application of 30th January 1991 for a writ of summons against Mark
Larson, Sofia Larson prayed the District Court to make a decree absolute of
divorce between them and, also on an interlocutory basis, to award her custody
of their child JULIA Sofia, nat. reg. no. 900813-3929, and to order Mark Larson
to pay SEK 1,078 maintenance monthly for their daughter, with effect from 28th



EXHIBIT B
0038

January 1991 and until the child is 18 years old, accrued amounts to be paid immediately and subsequent amounts in advance of each calendar month.

Mark Larson having been served with the summons application and a special injunction but nothing having been heard from him thereafter, the District Court, on 10th May 1991 and until such time as these questions were decided by a judgement having force of law or pending decision to the contrary, the District Court made an order in accordance with Sofia Larson's points of claim in the matters of custody and maintenance, though without indicating that accrued amounts of maintenance were to be paid immediately.

At a preliminary hearing on 2nd November 1992, Sofia Larson prayed the District Court to make a decree absolute of divorce between the parties by part-judgement and, also, on an interlocutory basis, to award her sole custody of their daughter Julia and to order Mark Larson to pay her, as maintenance for their daughter, SEK 1,075 monthly for the period between 1st January and 31st May 1991 inclusive, and SEK 1,125 monthly as from 15th January 1992 and until the child is 18 years old. Mark Larson consented to the divorce claim but contested the custody and maintenance claims. He confirms SEK 1,075 per month as reasonable maintenance but claimed that he had discharged his maintenance obligation for the period preceding 15th January 1992. For his own part, also on an interlocutory basis, he claimed, in the first instance, sole custody of the daughter and maintenance for her. In the second instance, in the event of Sofia Larson being awarded custody of the daughter, Mark Larson also on an interlocutory basis, prayed that he be awarded right of access to the daughter for two continuous months per annum between 1993 and 1997 and for six weeks per annum thereafter, custody to be exercised in the USA. Sofia Larson contested Mark Larson's custody and maintenance claims. As regards the custody claim, Sofia Larson consented to Mark Larson being entitled to access to the child three times annually for one week at a time, the access to be exercised in her home or in some other place on which the parties were able to agree, but not in the USA.

On 13th November 1992, pending the determination of these matters by a judgement having force of law or decision to the contrary, the District Court ordered as follows:

- (1) Custody of the daughter of the parties, Julia, shall continue, as ordered by the District Court in its temporary order of 10th May 1991, to be vested in Sofia Larson.
- (2) The District Court finds no cause to amend its temporary order of 10th May 1991 in the matter of maintenance, which order shall accordingly remain in force.
- (3) Mark Larson shall be entitled to access to the daughter, Julia, for one month in the year, at a time to be agreed on in detail between the parties.



In its part-judgement of 13th November 1992, the District Court made a decree absolute of divorce between the parties.

Sofia Larson and Mark Larson have filed separate appeal against the District Court's order of 13th November 1992, and in doing so presented the following points of claim.

Sofia Larson has prayed the Court of Appeal to set Mark Larson's right of temporary access to their daughter Julia at one week during the autumn term, one week during the spring term and one week in the summer months. She has further stipulated that the access shall take place in her home or in another place in Sweden which she may indicate, that access may not be exercised during the Christmas and New Year holiday and on no occasion in the USA, and that the time of access shall be decided two weeks in advance of each occasion, with Mark Larson notifying her of his wishes.

Mark Larson has prayed the Court of Appeal to award him right of temporary access to the daughter of the parties, Julia, in the USA for a period of two continuous months annually, subject to his being obliged, not less than one month before the time when he intends access to begin, to notify Sofia Larson accordingly, and also to set his temporary maintenance obligation to Sofia Larson at SEK 1,075 monthly as from 15th January 1992, payable in advance of each calendar month.

Sofia Larson and Mark Larson have contested each other's amendment claims.

The Court of Appeal makes the following

FINAL ORDER

In view of the child's age and other circumstances, it is appropriate that Mark Larson's rights of temporary access to the daughter, Julia, should be defined as referring to access in Sweden and should mainly be arranged in accordance with Sofia Larson's petition to Court of Appeal.

In the matter of maintenance it follows from the provisions of Chap. 7, Section 15 of the Code of Parenthood and Guardianship that a temporary maintenance order can at any time be amended by the Court as regards the ongoing maintenance obligation, whereas reappraisal of such an order, with retroactive effect, shall not take place until the case has been determined. Thus the decision contested shall be deemed to comprise Mark Larson's obligation, for the period from 13th November 1992 until the child is 18 years old, to pay SEK 1,078 maintenance monthly for the daughter in advance of each calendar month. The Court of Appeal finds no cause for amending the order thus made.

With reference to the above, the Court of Appeal amends the contested decision insofar as the Court of Appeal, pending the determination of the matter by judicial



decision or an order having gained force of law, or pending decision to the contrary, orders that Mark Larson shall have a right of access to the daughter of the parties, Julia Sofia, nat. reg. no. 900813-3929, for one week between the months of January and May, two weeks between the months of June and August and one week before the months of September and December, though not during the Christmas or New Year holiday. Access may only be exercised in Sweden, at a place designated by Sofia Larson and at the exact times which, Mark Larson having apprised Sofia Larson of his preferences, have been decided two weeks in advance of every occasion.

For services rendered in the Court of Appeal proceedings, the Court of Appeal awards Anita Wallin Wilberg SEK 1.780 and Bengt Hennel SEK 2.670 as remuneration under the Legal Aid Act.

INSTRUCTIONS FOR APPEAL

Any appeal against the awards of remuneration to Anita Wallin Wilberg and Bengt Hennel shall be made, by limited appeal, not later than Tuesday, 9th February 1993.

Under Chap. 20, Section 12(3) of the Code of Parenthood and Guardianship, no appeal can be made against the Court of Appeal's decision on other respects. For instructions concerning prosecution of appeal proceedings, see enclosure.

(Signature:)

Keeper of the Minutes

Record read and approved 12.1.1993/(Initials)

Given 12th January 1993

(Stamp:)

COURT OF APPEAL FOR
SOUTHERN NORRLAND

For a true copy,

(Signature)



Tab C

FILED

CLERK OF DISTRICT COURT

APR 21 1995 2:55 PM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

BY: _____
DEPUTY CLERK

In the matter of:

JULIA LARSON,

A minor child.

Case No. 94-CV-87J

KARIN SOFIA OHLANDER, fka
KARIN SOFIA LARSON,

Petitioner,

vs.

MARK ANDREW LARSON,

Respondent.

ORDER AND JUDGMENT

This action came before the court, the Honorable Bruce S. Jenkins, Senior United States District Judge, presiding, on Friday, April 21, 1995, at 9:30 a.m., for a nonjury trial. The court having entered its Findings of Fact and Conclusions of Law, now, based upon the record and pursuant to this court's jurisdiction under article III, section 2 of the United States Constitution, 42 U.S.C. § 11603 and the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980 (the Hague Convention), and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

51
0010

1. The Petitioner is DENIED leave to withdraw her petition under the Hague Convention, and Petitioner's motion to dismiss her Hague Convention petition is DENIED.

2. The Application for Withdrawal of Counsel for Petitioner is DENIED.

3. The Petitioner's petition under the Hague Convention, filed in these proceedings, is DENIED on the merits.

4. The minor child, Julia Sofia Larson, is to be returned to the State of Utah, so that the courts of the child's place of habitual residence, namely, Utah County, Utah, United States of America, may determine the issue of custody. The Petitioner and Respondent are hereby ordered to take all steps necessary to cause the return of the minor child, Julia Sofia Larson, to the State of Utah so that a Utah state court can determine the issue of custody and related matters. Once Julia Sofia Larson is returned to the State of Utah, no person shall remove her from the State of Utah without an express written order of this court or of the state court in Utah County, Utah, where the matter of custody is presently pending.

5. This court respectfully requests the assistance of the Contracting States in recognizing and enforcing this court's ruling under the Hague Convention.

6. The court determines that this Order and Judgment fully resolves the Petitioner's Hague Convention claims. The court expressly determines that there is no just reason for delay in entering this order as a final, appealable judgment under Federal Rule of Civil Procedure 54(b), and directs that this Order and Judgment be so entered.


7. The Respondent's claims for an award and judgment of attorney fees and other expenses incurred in these proceedings are hereby reserved.

8. Except as modified by this Order and Judgment, the court's Order of August 15, 1994, shall remain in full force and effect.

9. This Order and Judgment shall remain in full force and effect pending any appeal thereof unless stayed by further order of this court or the court of appeals.

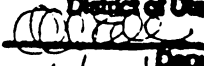
MADE AND ENTERED this 12 day of June, 1995.

BY THE COURT


BRUCE S. JENKINS
SENIOR UNITED STATES DISTRICT JUDGE

I hereby certify that the annexed document is a true and correct copy of the original on file in this office.

ATTEST: MARKUS B. ZIMMER
Clerk, U.S. District Court
District of Utah

By: 
Deputy Clerk
Date: 6/13/95

Tab D

SUPREME ADMINISTRATIVE COURT

JUDGMENT

Case no.

4936-1995

delivered in Stockholm on December 20, 1995

COMPLAINANT

Sofia Öhlander, personal identification no. 671029-7505, of Flangatan 6 C, 811 39 Sandviken

Representative and counsel under the Legal Aid Act:
Anita Wallin Wiberg, Attorney-at-law, Advokatfirman
Hähne & Co, Box 1333, 801 38 Gävle

OPPOSITE PARTY

Mark Larson, date of birth November 5, 1965, of 686
South 850 East, Orem, Utah 84058, USA

Representative and counsel under the Legal Aid Act:
Fredric Renström, Attorney-at-law, Birger Jarlsgratan
13,
111 45 Stockholm

APPEAL AGAINST A COURT DECISION

Judgment delivered by Sundsvall Administrative Court
of Appeal on August 25, 1995 in case no. 2513-1995
(Annex)

MATTER

Return of a child pursuant to the Act (1989:14)
concerning the Recognition and Enforcement of
Foreign Decisions relating to Custody etc. and
concerning the Return of Children.

DEMANDS ETC.

Sofia Öhländer demands that the Supreme Administrative Court alter the judgment of the Administrative Court of Appeal, dismissing Mark Larson's suit and withdrawing that judgment. She also demands that the Supreme Administrative Court shall obtain information/a report from the social welfare committee in Sundsvall about Julia's present home conditions and that this report should be completed with a report from the Children's and Adolescents' Psychiatric Clinic for the purpose of establishing how the child has adjusted to Sweden - and whether returning her would entail serious risks to her mental or physical health. In support of her suit in respect of the return of Julia, Sofia Öhländer has adduced the following. After her birth Julia has resided in Sweden ever since November, 1990, with the exception of seven months during 1991 and two months at the turn of 1993/1994. Mark Larson took the law into his own hands when he fetched Julia in November, 1993. In 1992 and 1993 Mark Larson took part in the Swedish custody proceedings, thus accepting Swedish jurisdiction. In view of Sofia Öhländer's intention of remaining in Sweden with Julia and the length of time that Julia has spent in Sweden, her adjustment to this country and Mark Larson's passivity, it must be concluded that in February, 1994 Julia's habitual residence was Sandviken.

Mark Larson contests the granting of the appeal and the demand that the Supreme Administrative Court arrange for further investigation in the case. In support of his suit he has adduced the following. He has never accepted that Julia should live in Sweden, nor that Sofia Öhländer should have custody of her. Julia was residing in the USA in January/February, 1994 when Sofia Öhländer unlawfully abducted her. Subsequently, Sofia Öhländer has prevented all contacts between him and Julia.

In its decision of August 30, 1995 the Supreme Administrative Court ordered a stay of execution of the judgment of the Administrative Court of Appeal with regard to the return of Julia.

REASONS FOR THE SUPREME ADMINISTRATIVE COURT'S DECISION

The evidence in the case has established the following facts. Mark Larson and Sofia Öhlander were married on October 27, 1989 in the USA and their daughter Julia was born there on August 13, 1990. The family went to Sweden in November, 1990, after which Mark Larson returned to the USA alone in the beginning of January, 1991. That same month Sofia Öhlander filed a petition for divorce and sole custody of Julia at Sandviken District Court. In May, 1991 she was awarded temporary custody of her daughter. In June, 1991 she went to the USA with Julia, but returned to Sweden in January, 1992, on which occasion she took her daughter with her without Mark Larson's consent. When the qualifying period for the divorce expired, Sofia Öhlander proceeded with her divorce suit. In November, 1992 verbal proceedings were held in the divorce case, as a result of which Sofia Öhlander was awarded continued temporary custody of her daughter and Mark Larson was granted visiting rights. In May, 1993 Mark Larson paid a short visit to Sweden. The couple were divorced the same year. In November, 1993 Mark and his new wife visited Sweden, and subsequently took Julia to the USA without Sofia Öhlander's consent. In January, 1994 Sofia Öhlander went to the USA. Under an ex parte order she was provisionally awarded custody of Julia without the right to leave the USA. However, on February 2, 1994 she took Julia with her to Sweden, where they have lived ever since. On January 27, 1995 Mark Larson filed a petition with the Gävleborg County Administrative Court for the return of Julia to the USA under the Act (1989:14) concerning the Recognition and Enforcement of Foreign Decisions relating to Custody etc. and concerning the Return of Children (the Enforcement Act).

The provisions of the Enforcement Act concerning the return of children are based on the Convention adopted by the Hague Conference in 1960 on the Civil Aspects of International Child Abduction (the Hague Convention). A general objective of the Convention is to protect children against the harmful effects

of being uprooted from their familiar environment. For this purpose the Convention includes provisions making it possible for a child who has been unlawfully abducted from one State Party to another to be speedily returned to the former so as to restore the status quo. The Convention has been incorporated into Swedish law insofar as provisions intended to reproduce the provisions of the Convention have been included in the Enforcement Act. The section that is most relevant to the case is section 11 of the Enforcement Act, which corresponds to Articles 3 and 12, paragraph 1 of the Hague Convention. As will be explained in greater detail below, the main issue in this case is whether the abduction of Julia on February 2, 1994 from the USA to Sweden was unlawful within the meaning of the above section.

Pursuant to section 11, subsection 1 of the Enforcement Act, a child who has unlawfully been brought to this country, or who is unlawfully held in custody here, shall upon demand be returned to the person from whom the child is being withheld if the child resided in a State Party immediately prior to the abduction or holding in custody. Under section 11, subsection 2, an abduction or holding in custody is unlawful if it conflicts with the guardian's or another person's right to the custody of the child in the state where the child resided immediately prior to the abduction or holding in custody, provided that this right was exercised at the time when the child was abducted or held in custody, or would have been exercised if the abduction or holding in custody had not taken place.

Under the Act the question of who was the child's guardian at the time of the abduction and the question of whether the abduction was unlawful is to be decided in accordance with the law in the state in which the child resided at the time of the abduction (section 11, subsection 2 and the special statement of reasons on this section in Gov. Bill 1983/89:8, p. 40; see also the provisions of sections 14 and 23, subsection 1 of the Act). Another consequence of these provisions is that the

5

abduction of a child from another state to Sweden is not unlawful within the meaning of the Act if the child resided in Sweden immediately prior to the abduction. The meaning of the term residence is thus crucial to the application of the provisions of the Enforcement Act that relate to the return of a child.

A Swedish court deciding on a petition to return a child from Sweden to another country must make an independent decision on the residence of the child at the time to which section 11, subsection 2 of the Enforcement Act is applicable. The term residence is not defined in the Enforcement Act. In the legislative history of the Act (Gov. Bill 1988/89:8, pp. 36 and 40) reference was made to the pronouncements on residence made in connection with the incorporation in 1973 of this term in chapter 7, section 2 of the Act (1904:26 s. 1) on Certain Matters of International Law concerning Marriage and Guardianship. (The pronouncements are contained in Gov. Bill 1973:138, pp. 78). This definition and the pronouncements in the Bill cited above formed the basis of the definition of the term residence applied in subsequent Swedish legislation and in case law on international family law and related fields (see, for example, Gov. Bills 1982/83:38, pp. 12 ff. and 1984/85:124, p. 40, and NJA (New Juridical Archives) 1977, p. 706, 1983, p. 359 and 1987, p. 600).

Thus, although the legislative history of the Enforcement Act refers to the need, in connection with the application of the provisions of the Act that relate to the return of a child, to take into account the definition of the term residence used in other national legislation, it must nevertheless be borne in mind that the Enforcement Act is an Act governed by the provisions of an international convention. In interpreting this concept it is therefore appropriate to take particular notice of the terminology and purpose of the Hague Convention.

The expression "residence" in the Enforcement Act corresponds to the expression "habitual residence" or "résidence habituelle" in the Hague Convention.

This concept has long been well-established within the framework of the Hague Conference, and it is used in several of the conventions adopted by the Conference. These conventions do not contain an explicit definition of the concept, but according to the references in the relevant literature the term relates primarily to the actual circumstances (see, inter alia, the summary in SOU (Gov. Official Reports) 1976:39, pp. 119-122). Basically, an all-round appraisal must be made of such verifiable circumstances as the length of the stay and social attachments and other circumstances of a personal or professional nature that indicate a lasting connection with one country or the other. The individual's intention whether or not to stay in the country of residence can also be taken into account, but the current view appears to be that, as a rule, no great importance should be attached to subjective factors. In the case of a child who is not old enough to make it possible to consider his or her intentions regarding the future, other circumstances - in particular, the residence of the guardian, and the home and social conditions - must obviously be decisive. The question has been formulated in terms of where the child's "effective life center" is (cf. SOU 1976:39, p. 120 and Gov. Bill 1984/85:24, p. 42). A point that should always be considered when interpreting the term "habitual residence", as well as the Swedish concept of residence, is that the purpose of the rules containing the term should be taken into account, and that interpretations may therefore differ depending on the context.

A special issue as regards the residence of small children is what rules to apply in cases where the parents have joint custody of the child and the child is moved from one country to another against the will of one of the guardians. It has been asserted on various occasions that such changes of residence should not result in the child acquiring a new residence (see, for example, the references quoted by Bogdan in Tidskrift för Juridiska Föreningen i Finland 1982, p. 118, note 38, and NJA 1995, p. 241). However, the sphere of application of this principle is not clear (cf. Bogdan, *ibid.*).

118-112, Pålsson, Svensk rättspraxis i internationell familje- och arverätt, pp. 104-108 and NJA 1974, p. 390 and p. 629 I and II). With particular reference to the Enforcement Act and the Hague Convention on which it is based, it should be taken into account that one general objective, as has already been mentioned, is to protect children against the harmful effects of being uprooted from their familiar environment, and that one of the functions of the term residence for the purposes of the Act, like "habitual residence" in the Convention, is to specify the kind of connection with a country that gives the right to protection under the Act and the Convention, respectively. It is not consistent with this objective for an abduction against the will of one of the child's guardians to be instrumental in changing the child's residence. On the other hand, it does not seem entirely consistent with that objective to regard the circumstances of the abduction as a permanent obstacle to the establishment of a new residence. If the child has been in the new country for such a length of time and under such conditions that it has acquired a connection with the country of the kind referred to in the provisions, there should be no obstacle to considering that it has acquired a new residence. Particular note should be taken in this connection of the fact that under the provisions of section 12 of the Enforcement Act, as well as Article 12 of the Convention, the return of a child that has been unlawfully abducted may be refused where, at the time of the submission of an application for the child's return, at least one year has passed from the time of abduction and the child has settled down in its new environment.

A matter that must be resolved in this case is whether the abduction of Julia from the USA to Sweden in February, 1994 was unlawful within the meaning of the Enforcement Act. From the above remarks it is clear that the abduction cannot be regarded as unlawful if Julia's residence at the time of the abduction was Sweden. The evidence shows that Julia arrived in Sweden together with her mother Sofia Öhländer in January, 1992 and that she subsequently lived with her mother in Sandviken up

until November, 1993, when Mark Larson took her to the USA without her mother's consent. Nor is there any doubt that Sofia Öhlander acquired Swedish residence after her arrival in Sweden. The circumstances related above and the other information that has been supplied about Julia's stay with her mother and her adjustment to conditions in Sandviken also clearly indicate that she had acquired Swedish residence some time prior to her abduction to the USA in November, 1993.

However, in conformity with the above reasoning, the circumstances in which Julia was taken back to Sweden in January, 1992 should also be taken into account in an assessment of her residential status. The investigation supports Mark Larson's claim that the abduction took place against his will. However, he did not file a petition for the return of the child following the abduction. Considering this fact, the circumstances in connection with the abduction in January, 1992 should not, on expiry of the twelve-month period referred to in both the Enforcement Act and the Convention, prevent the child from acquiring residence in Sweden. In view of the above account of Julia's stay in Sweden and her adjustment to Swedish conditions, the Supreme Administrative Court finds that she must be considered to have acquired Swedish residence some time before November, 1993, when she was taken back to the USA by Mark Larson. The subsequent events - Julia's abduction to the USA and her stay there lasting over two months - cannot once again have changed her residential status. Consequently, pursuant to section 11, subsection 2 of the Enforcement Act, she must be deemed still to have had Swedish residence at the time of the abduction from the USA in February, 1994 that is at issue in this case.

The abduction in February, 1994 was therefore not unlawful within the meaning of section 11, subsection 2 of the Enforcement Act. Consequently, the provisions of the Enforcement Act offer no possibility of returning Julia to the USA. Sofia Öhlander's main suit shall therefore be granted.

In view of this ruling, no measures are necessary with regard to Sofia Öhlander's demand for further investigation in respect of Julia.

The matter of the parties' legal costs remains to be settled. Sofia Öhlander's suit implicitly includes a demand that she be released from the obligation to pay Mark Larson's legal costs in the lower courts. This matter must be decided in accordance with the provisions of section 21 of the Enforcement Act and chapter 21, section 13, subsection 1 of the Code on Parents, Children and Guardians. Under those provisions the court may, where this is deemed reasonable, order a party to pay the other party's legal costs. On the basis of an overall assessment of the case the Supreme Administrative Court finds that there is no reasonable cause for either of the parties to be obliged to pay the other party's legal costs. This applies to the parties' legal costs both in the lower courts and in the Supreme Administrative Court. Therefore, Sofia Öhlander's suit shall also be granted in this regard.

DECISION OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court reverses the judgment of the Administrative Court of Appeal and upholds the judgment of the County Administrative Court in the matter of the return of the child.

Reversing the judgment of the Administrative Court of Appeal, the Supreme Administrative Court releases Sofia Öhlander from the obligation to pay Mark Larson's legal costs in the lower courts.

The Supreme Administrative Court rules that remuneration shall be paid under the Legal Aid Act in the amount of 16 216 kronor to Anita Wallin Wiberg, Attorney-at-law, for her work as counsel for Sofia Öhlander and in the amount of 12 402 kronor to Fredric Renström, Attorney-at-law, for his work as counsel for Mark Larson. Neither party shall be obliged to pay the other party's legal costs in the Supreme Administrative Court.

10

/signature/
Stig Brink

/signature/
Elisabeth Palm

/signature/
Sigvard Berglöf

/signature/
Anders Swartling

/signature/
Arne Baekkevold

/signature/
Anna-Karin Hoffstedt
Reading Clerk to the Supreme
Administrative Court

Div. III

Presented on October 31, 1995

I, the undersigned, hereby certify that this is a true translation of the original Swedish document.



Robert F. Crofts
January 9, 1995



Certified Public Translator from
Swedish into English and from
English into Swedish accredited
by the Swedish Board of Trade

Tab E

the argument of counsel and having reviewed the file and being fully advised in the premises, hereby enters its:

FINDINGS OF FACT

1. Plaintiff Mark Andrew Larson ("Mark") is a U.S. citizen and Defendant Karin Sofia Ohlander ("Sofia") is a citizen of Sweden. The parties were married on October 27, 1989, in South Jordan, Utah, and established their marital home in Utah County, Utah. Thereafter Sofia began the immigration process and became a permanent resident of the United States.

2. Plaintiff is presently a resident of Utah County, Utah, and has been for more than three (3) months immediately prior to the commencement of this action.

3. Irreconcilable differences have arisen between the parties making the continuation of the marriage impossible.

4. There has been one (1) child born as issue of this marriage, to wit: Julia Sofia Larson ("Julia"), born August 13, 1990, in Provo, Utah.

5. Mark should be awarded the care, custody and control of

said minor child subject to Sofia's reasonable rights of visitation.

6. Neither party should be awarded alimony from the other.

7. Sofia should be required to pay child support to Mark according to the child support schedules adopted in the State of Utah.

8. The present distribution of personal property of the parties should be confirmed.

9. Each party should be ordered to assume and pay their own debts incurred during the marriage and since the separation.

10. Plaintiff should be granted a Decree of Divorce, Nunc Pro Tunc, effective October 21, 1993.

11. At the end of 1990 the parties went on vacation with their child to Sweden to visit Sofia's family for Christmas, with the intent to return to their home in Utah in January 1991. At the end of the visit, Sofia decided to remain in Sweden and went into hiding with the child, refusing to tell Mark where she and the child were or to allow the child to return home with Mark to Utah. Mark had to return to Utah by himself in mid-January 1991.

12. Sofia commenced a divorce and custody action in Sweden on January 30, 1991.

13. By means of phone calls over the next few months, Mark persuaded Sofia to return with their child to their home in Utah, which she did on June 3, 1991. Sofia assured Mark that she considered their reconciliation to be complete and unconditional, and that she was having her lawyer dismiss her Swedish divorce and custody action, in which she had obtained a default temporary custody order in her favor. Mark believed and relied upon Sofia's assurances.

14. The parties and their child lived together as a family in Utah until January 13, 1992, upon which date Sofia abandoned Mark without warning and moved to Sweden, taking their minor child with her without Mark's foreknowledge or consent and directly against his will.

15. Sofia then petitioned for the divorce and custody matters in the action she had filed in Sweden in 1991 to be finalized, which action she had not dismissed as she had led Mark to believe.

16. Mark inquired of several attorneys, as well as a consular

officer at the United States Embassy in Sweden, regarding his legal options, but he was not informed about his rights under the Hague Convention on the Civil Aspects of International Child Abduction (1980), an international treaty requiring that wrongfully abducted children be returned promptly to their country of habitual residence.

17. Mark attempted to negotiate a resolution with Sofia through their Swedish attorneys, but Sofia demanded sole custody of Julia and insisted that any visitation between Mark and Julia must take place in Sweden under her personal supervision.

18. Mark continually attempted to maintain contact with his daughter, but Sofia allowed only very restricted contact, and for the 3 month period, from February 7 to May 13, 1992, she cut off all contact between Mark and Julia.

19. In October 1992 Mark traveled to Sweden to try to see his daughter. He spent 2 weeks there, during which time Sofia allowed him to see Julia for a total of less than 14 hours, and only inside her apartment under her personal supervision.

20. Mark again traveled to Sweden in May 1993. Despite a

Swedish temporary visitation order in Sofia's Swedish divorce case purporting to grant Mark 4 full weeks per year of unsupervised visitation with his daughter, Sofia only allowed Mark to see Julia during specified daytime hours on seven consecutive days, under her constant personal supervision.

21. After further investigation regarding his legal rights, Mark came to believe that the Swedish court did not have proper jurisdiction over the divorce or custody matters and that the proper forum for these matters was Utah, so he filed for divorce and custody in this Court in June 1993 (Case No. 934401196). A decree of divorce between the parties was entered by this Court on October 21, 1993, in which the issue of custody was reserved.

22. After entry of that divorce decree, Mark remarried. However, that decree was subsequently vacated on February 27, 1995, due to insufficiency of service upon Sofia.

23. Mark filed this *nunc pro tunc* divorce action on December 19, 1994. Sofia was personally served in this action on December 27, 1994, and has appeared generally and has continuously participated in this matter and has been represented by local

counsel.

24. In November 1993 Mark and his wife went to Sweden to see Julia. Again Sofia only allowed Mark to see Julia during specified daytime hours and mostly inside her apartment, but on an occasion outside Sofia's apartment Mark and his wife eluded Sofia and brought Julia back to Utah.

25. Immediately upon returning to Utah, in an effort to maintain contact between Julia and Sofia, Mark telephoned Sofia and informed her that Julia was with him in the United States and that she was safe and happy. Julia spent the next two months living with Mark and his wife in Utah.

26. Mark speaks Swedish fluently, and his wife is also quite proficient in Swedish. With their help, Julia became fairly proficient in English during the two months that she lived with them and could even read simple English words and count well past twenty. Julia also developed close, trusting relationships with both her father and his wife during this time.

27. During this time Mark took Julia to the dentist because he was concerned about what appeared to him to be significant decay

of at least eight of her teeth. Mark obtained an estimate from the dentist stating that it would cost approximately \$1006 to repair the damage to her teeth. Mark was unable to have this dental work completed because of Sofia's subsequent illegal removal of Julia from the United States on February 1, 1994.

28. In late December 1993, Mark received a telephone call from Lloyd Eldredge, a Utah attorney representing Sofia. He informed Mark that Sofia intended to file an action in Utah alleging that Mark had wrongfully removed Julia from Sweden in violation of the Hague Convention on the Civil Aspects of International Child Abduction. This was the first Mark had heard of the Hague Convention.

29. On January 26, 1994, Sofia filed a Hague Convention action in the U.S. District Court for the District of Utah (Civil Action No. 94-CV-87J). On the same date Sofia secured a temporary ex parte Order for Issuance of Warrant in Lieu of Writ of Habeas Corpus, which ordered the issuance of a warrant directing any peace officer within Utah to take Julia into protective custody and release her to Sofia. This temporary order also set the case for

a hearing on February 1, 1994, and ordered that Sofia or her agent not remove Julia from the State of Utah pending further order of the Federal Court. According to the Federal Court's Findings of Fact in that case, the said ex parte Order did not affect the status of the parties' legal custody rights.

30. In compliance with that ex parte Order, and in an effort to spare his daughter the trauma of being taken into protective custody, Mark arranged to deliver Julia directly to Sofia, which he did in the presence of a U.S. Marshal on January 30, 1994.

31. Two days later, on February 1, 1994, Sofia fled from the United States to Sweden with the parties' child, in violation of the ex parte Order she had secured from the Federal Court.

32. On February 17, 1994, the Federal Court entered an Order to Show Cause requiring Sofia to return to Utah with the child and show cause why she should not be found in contempt of court for her willful disobedience of the Federal Court Order. Sofia refused to comply with the Order to Show Cause, and on August 15, 1994, the Federal Court issued an Order finding Sofia in contempt and requiring her to cause Julia to be returned to the State of Utah

and the Federal Court within 30 days. Again, Sofia refused to comply.

33. For over 2 years and 4 months following her illegal removal of Julia from Utah on February 1, 1994, Sofia actively prevented all contact between Mark and his daughter. During this time Mark made diligent efforts to re-establish contact with his child, including making regular calls to Sofia's phone number and leaving messages on her answering machine, as well as employing the assistance of a consular officer at the American Embassy in Sweden in an attempt to persuade Sofia to allow him to at least speak with his daughter on the phone, but all his efforts were fruitless.

34. On June 12, 1995, the United States District Court for the District of Utah entered its final judgment on the merits of Sofia's Hague Convention case. The Court's ruling included the following:

a. Utah is the only place Julia has ever lived with the consent of both parents;

b. Julia has been habitually resident in Utah County, Utah, continuously since her birth in August 1990;

c. Under the Hague Convention, the proper forum for an adjudication of the parties' custody and visitation rights with respect to their daughter, Julia, is and always has been the state court in Utah County, Utah (i.e. this Court);

d. Sofia's retention of Julia in Sweden in 1991 and her removal of Julia from Utah to Sweden in 1992 were wrongful under the Hague Convention;

e. Any participation by Mark in Sofia's Swedish divorce action was without full knowledge or understanding of his legal rights, and did not amount to a waiver of any Hague Convention rights or remedies;

f. None of the temporary custody orders obtained by Sofia in Sweden have ever been granted legal recognition under the Utah Uniform Child Custody Jurisdiction Act, Utah Code Ann. § 78-45c-1 through -26 (1992 & Supp. 1994);

g. Mark's right of joint legal custody of Julia has never been terminated under Utah law;

h. Mark's return of Julia from Sweden to Utah in November 1993 was lawful under the Hague Convention and had the

effect of restoring Julia to her habitual residence in Utah;

i. Both parties were ordered to "take all steps necessary to cause the return of the minor child, Julia Sofia Larson, to the State of Utah so that a Utah state court can determine the issue of custody and related matters." In its ruling the Federal Court also officially requested "the assistance of the Contracting States in recognizing and enforcing [the federal] court's ruling under the Hague Convention."

35. Sofia continues to willfully defy the final Hague Convention judgment from the Federal Court.

36. The Findings of Fact, Conclusions of Law and Order and Judgment of the U.S. District Court in the above-mentioned action are entitled to full faith and credit from this Court, in accordance with Article IV of the Constitution of the United States of American and U.S.C. 11603(a).

37. The U.S. District Court in the above-mentioned judgment found that "No substantive action has occurred in the Swedish divorce suit since the [Swedish] Court of Appeal made its order in January 1993" (regarding temporary visitation), and that "No final

hearing has been held in the [Swedish] District Court on the issues of custody and visitation." Nothing has been presented to this Court to suggest that these circumstances have changed.

38. On February 16, 1995, Sofia appeared specially in this action and filed a Motion to Dismiss, contesting this Court's jurisdiction. At the hearing on her Motion on May 10, 1996, Sofia withdrew her objection and requested time to file an Answer to Mark's divorce and custody complaint, which she subsequently filed on May 30, 1995.

39. Due to Sofia's defiance of the Hague Convention judgment from the Federal Court, Mark was required to travel to Sweden to seek enforcement of the judgment through a Hague Convention court action in that country.

40. Mark and his wife spent two and one-half months in Sweden pursuing the case through the trial court and appellate court levels. During this entire time Sofia hid Julia from Mark and actively prevented all contact between Mark and his daughter, despite extensive efforts by Mark, his Swedish attorney, the American Embassy in Stockholm, and various Swedish authorities to

arrange for such contact.

41. While in Sweden Mark read and saw numerous newspaper articles and television news reports in which Sofia was interviewed by the Swedish media. During several of the television interviews, and also reportedly many of the newspaper interviews, Sofia had Julia with her and sometimes even participating in the interviews, while Sofia discussed her viewpoint on the parties' conflict over Julia and made very derogatory statements about Julia's father, including saying that he did not really care about Julia and only wanted her for a status symbol.

42. While in Sweden Mark also obtained a videotape copy of a half-hour television docu-drama that aired throughout Scandinavia, which portrayed Sofia's version of the parties' conflict over their daughter. In it, Sofia was interviewed at length, with Julia by her side, and Julia was used as an actor to portray herself in professional "re-enactments" depicting her being abducted by her father and found and rescued by her mother, both of whom were played by professional actors.

43. The Swedish lower court denied Mark's petition for

Julia's return under the Hague Convention treaty, but on August 25, 1995, the Swedish appellate court reversed the lower court's ruling and ordered that Julia be returned to the United States, and that Sofia must turn Julia over to Mark on or before August 31, 1995, with enforcement by the Swedish police if Sofia did not comply.

44. Sofia continued to hide Julia from Mark, and on August 30, 1995, the Swedish Supreme Administrative Court gave Sofia leave to appeal the Swedish appellate court ruling and stayed its enforcement.

45. Sofia has also appealed the Federal Court judgment to the U.S. Court of Appeals for the 10th Circuit. However, she has been denied any stay of the judgment.

46. On October 12, 1995, pursuant to an Order to Show Cause hearing held October 10, 1995, at which Sofia was represented by counsel, this Court ordered Sofia to strictly comply with the Federal Court judgment and to immediately turn Julia over to Mark for return to Utah. On October 17, 1995, upon Sofia's motion, this Court modified its order by granting Sofia until November 13, 1995, to present herself and Julia to the Court, and ordered that if she

failed to do so she must turn Julia over to Mark for immediate return to Utah. Sofia willfully refused to comply in any respect.

47. At a hearing on November 17, 1995, at which Sofia was represented by counsel, this Court found Sofia in contempt for her refusal to obey its order dated October 17, 1995, issued a pick-up order for the child, and ordered Sofia to pay Mark \$750 for attorneys fees. The Court also ordered Sofia to appear in person at a hearing on December 8, 1995, otherwise a warrant would issue for her arrest. After a telephone conference with the parties' respective counsel on November 30, 1995, the Court further ordered Sofia to file an affidavit within 7 days disclosing the address where she and Julia were living. Sofia failed to comply with these orders in any respect, and at the hearing on December 8, 1995, Sofia was again found in contempt and a warrant was issued for her arrest.

48. On December 20, 1995, the Swedish Supreme Administrative Court reversed the ruling of the Swedish appellate court and ruled that Sweden would not respect the final judgment of the Federal Court under the Hague Convention treaty and would not order the

return of Julia to the United States. The Swedish ruling does not purport to deal with or dispose of the issue of custody.

49. Pursuant to an Order to Show Cause hearing on January 17, 1996, at which Sofia was represented by counsel, this Court entered a temporary custody order on March 19, 1996, awarding sole custody of Julia to Mark and ordering Sofia to immediately return Julia to Utah, to pay to Mark an additional \$750, and to pay Mark child support in accordance with the Utah state child support guidelines. Sofia willfully refused to comply in any respect.

50. At an Order to Show Cause hearing on June 11, 1996, at which Sofia was represented by counsel, this Court ordered Sofia to initiate a weekly telephone conversation between Mark and Julia every Thursday at 10:00 a.m. Utah time. As of October 18, 1996, when this case went to trial, Sofia had complied with only 13 of the 19 ordered weekly phone conversations between Mark and Julia, and she personally monitored those conversations which she had allowed.

51. Also at the June 11 hearing, Mark made a formal offer to pay all necessary expenses for Sofia and Julia to come to Utah for

the final custody hearing, including round-trip travel expenses, up to \$500 per month for lodging in Utah, and reimbursement for up to 3 months of lost wages and for any tuition fees Sofia might forfeit. Although this offer was conveyed to Sofia by her counsel, Sofia refused to return with Julia to Utah.

52. At a hearing on July 2, 1996, upon Sofia's motion this Court appointed Ms. Lorie Fowlke as Guardian Ad Litem for Julia. On July 31, 1996, Ms. Fowlke traveled to Sweden and spent a week there meeting with Julia, Sofia, Sofia's mother, personnel at the day care center where Sofia has enrolled Julia, the parties' Swedish counsel, and others. Ms. Fowlke submitted a formal report and recommendations to the Court on August 12, 1996.

53. At the scheduled trial on August 14, 1996, at which Sofia was represented by counsel, this Court granted Sofia's motion for a continuance and set a new trial date for October 18, 1996. In accordance with the written recommendations of the Guardian Ad Litem the Court ordered that temporary custody of Julia remain with Mark, that Sofia be granted reasonable visitation, that both parties engage in mediation, and that Sofia take the divorce

education class by watching a videotape and then filing an affidavit stating that she had done so. The Court further ordered that Sofia file and serve answers to Plaintiff's Interrogatories and Requests for Production of Documents no later than September 1, 1996, which interrogatories had been served upon her nearly 12 months earlier, and that Sofia pay to Mark the two ordered \$750 money judgments no later than October 1, 1996, which judgments had been outstanding for 5 and 9 months, respectively. This order was entered on September 3, 1996, and except for some participation in unsuccessful mediation, Sofia willfully failed to comply with it in any respect.

54. Mark has completed the mandatory divorce education class.

55. Ever since at least February 1, 1994, Sofia has gone to great effort to prevent Julia from having any contact with her father. The supervised phone contact which Sofia has recently allowed was only allowed after this Court's specific order requiring her to initiate weekly phone contact between Julia and her father, which order Sofia has only partially complied with.

56. Since her wrongful removal of Julia from this country in

January 1992, Sofia has, against Mark's wishes, taught Julia that her last name is Ohlander rather than Larson, although her correct legal surname in both Sweden and the United States is Larson.

57. This Court finds that Sofia has been acting in her own self-interest and not in the best interests of the child.

58. Sofia is in flagrant contempt of the orders of this Court, and this Court has no reason to expect that she would comply with any visitation awarded to Mark if this Court were to grant her custody of Julia.

59. While Sofia and Mark were married and living together they shared the responsibility for and care of Julia fairly equally. During Sofia's wrongful retention of Julia in Sweden in the first part of 1991 and subsequent to her wrongful removals of Julia from the United States in January 1992 and February 1994, Sofia has forcibly excluded Mark from the day to day care of Julia through unlawful violations of his custody rights.

60. Mark has been remarried for over three years and can provide a stable family environment for Julia with himself, his wife, Julia's one year-old half-sister Natalie, and any other

children Mark and his wife may have in the future. Mark has held the same employment as an x-ray optics engineer at MOXTEK, Inc. for over 6 years and plans to continue working there. He has flexible work hours and has therefore the latitude to deal with parental responsibilities that may arise even during business hours. Mark's wife is a full-time homemaker and mother, and can therefore provide full-time care for Julia while Mark is at work. No such ability to provide a stable family environment or constant primary care for Julia has been demonstrated by Sofia, and according to the information provided to the Court by Sofia and the Guardian Ad Litem, Sofia has not remarried and has had Julia registered in day care in Sweden continuously since August 1993.

61. Mark has consistently affirmed to this Court and demonstrated that he feels that it is very important for Julia to have a close, loving relationship with her mother, and that he would work toward that goal if granted sole custody. Mark's wife has also attested to this same view and intent. In contrast, Sofia has consistently and unequivocally demonstrated a clear disregard for Julia's need to have a close, loving relationship with her

father.

62. It is in the best interests of the parties minor child that she be placed in an environment where there is considerably greater likelihood that people will consider the true needs of the child, especially her need to maintain a loving, healthy relationship with both parents. This is most likely to occur in the home of Mark and his present wife, not in the home of Sofia.

63. It is in Julia's best interests that she be in Mark's sole custody.

64. It is in Julia's best interests that there be a "break-in period" during which Sofia comes to Utah so that Julia can spend time with her mother daily while in the custody of her father.

65. It is in Julia's best interests that her relationship with her mother continue via liberal visitation, both inside of Utah and in the country of Sweden, but this must be arranged so as to ensure that Sofia will not violate Mark's rights of custody of Julia.

66. In light of the parties' differing countries of residence, it is in Julia's best interests that her parents

actively help her acquire and maintain the ability to communicate fluently in both English and Swedish.

From the foregoing Findings of Fact, the Court now enters its:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the divorce and custody matters and personal jurisdiction over the parties.

2. Plaintiff is entitled to a decree of divorce, *nunc pro tunc*, effective October 21, 1993.

3. In accordance with Article IV of the Constitution of the United States of America and U.S.C. 11603(a), this Court should afford full faith and credit to the Findings of Fact, Conclusions of Law, and Order and Judgment of the U.S. District Court for the District of Utah, dated June 12, 1995, in the Hague Convention case filed by Sofia.

4. None of the temporary custody orders obtained by Sofia in Sweden have ever been granted legal recognition under the Utah Uniform Child Custody Jurisdiction Act, Utah Code Ann. § 78-45c-1 through -26 (1992 & Supp. 1994), and they have no legal force or

validity in the State of Utah.

5. Neither party should be awarded alimony.

6. The present distribution of personal property and debts should be confirmed.

7. Permanent sole custody of the parties' minor child, Julia Sofia Larson, is awarded to Mark.

8. Sofia is awarded liberal visitation both in Utah and in Sweden, subject to appropriate restrictions that will ensure that she does not violate Mark's rights of custody.

9. Both parties shall actively help Julia acquire and maintain the ability to communicate fluently in both English and Swedish.

10. Sofia shall immediately return Julia to Utah and turn her over to Mark. To assist in making the transition easier for Julia, Sofia shall be allowed daily visitation with Julia in Utah during an initial 3-week "break-in" period, which visitation shall be arranged and overseen by the Guardian Ad Litem.

11. If Sofia fails to turn Julia over to Mark within 14 days of the entry of this decree, all law enforcement officers or other

appropriate authorities of the State of Utah, the United States of American, the country of Sweden, or any other jurisdiction where the child may be located, shall immediately pick up the parties' minor child, Julia Larson, and turn her over to her father, Mark Larson.

12. Mark is awarded child support from Sofia in accordance with the Utah State child support guidelines. Mark is not and shall not be required to pay child support to Sofia for the times when she is or has been unlawfully withholding Julia in violation of his custody rights. Mark is entitled to claim Julia as a dependent for tax purposes, starting on the tax return due April 15, 1997.

13. Sofia is in contempt of court for her willful violations of this Court's orders dated March 19, 1996, and September 3, 1996.

14. Sofia shall immediately pay Mark the two \$750 judgments already entered against her, as well as an additional \$750 as a sanction for her contempt of the temporary custody order dated March 19, 1996, and \$500 for her willful failure to answer Plaintiff's Interrogatories and Requests for Production of

Documents as ordered on September 3, 1996, for a total of \$2,750.

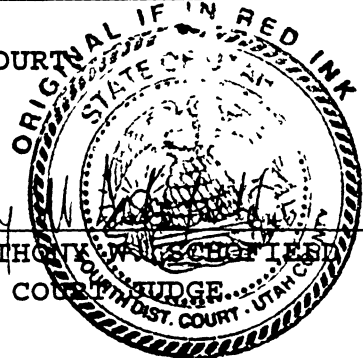
15. As long as either party remains a resident of the State of Utah, this Court shall retain exclusive jurisdiction to modify, negate, or supersede any of the terms of this decree.

16. This Court respectfully requests the Swedish courts, law enforcement officers, and other authorities to recognize, honor and enforce this decree.

DATED this 14th day of May, 1997.

BY THE COURT

Anthony
JUDGE ANTHONY M. SCHAFER
DISTRICT COURT JUDGE
DIST. COURT - UTAH

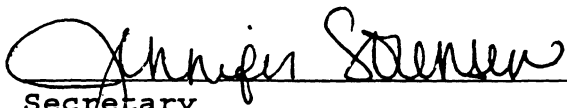


MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing on this 18th day of April, 1997, by first-class U.S. mail, postage prepaid, to the following:

Daniel Bertch
BERTCH & BIRCH
5296 S. Commerce Dr., #100
Provo, Utah 84107

Lorie Fowlke
Jeffs & Jeffs
90 North 100 East
P.O. Box 888
Provo, Utah 84603


Secretary

Tab F

the Uncompahgre Reservation, and the three disputed categories of non-trust lands discussed above.⁶

CONCLUSION

For the foregoing reasons, we DENY the defendants' motion to recall our mandate in *Ute Indian Tribe III*, 773 F.2d 1087 (10th Cir.1985) (en banc), cert. denied, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). Rather, we MODIFY our mandate in *Ute Indian Tribe III* as set out above and RE-MAND with instruction that the district court consider the Tribe's request for permanent injunctive relief in light of this opinion.



Karin Sofia OHLANDER, In the Matter of
Julia Larson, a Minor Child, f/k/a Karin
Sofia Larson, Petitioner–Appellant,

v.

Mark Andrew LARSON, Respondent–
Appellee.

Nos. 95–4114 & 96–4080.

United States Court of Appeals,
Tenth Circuit.

June 3, 1997.

After father took child from Sweden to United States without mother's permission, mother, a Swedish citizen, filed Hague Convention petition seeking child's return to Sweden. Mother subsequently took child from United States to Sweden, in violation of court order, and was found in contempt. Father then filed Hague Convention petition in Sweden for return of child to United States. Mother filed motion to voluntarily dismiss her district court petition. The United

States District Court for the District of Utah, Bruce S. Jenkins, J., denied motion, and subsequently ordered child's return to United States. Mother appealed. The Court of Appeals, Brorby, Circuit Judge, held that: (1) district court abused its discretion in denying motion to dismiss solely on basis of mother's contempt of its order not to remove child, and (2) dismissal of mother's petition was warranted.

Reversed and remanded with instructions.

Murphy, Circuit Judge, dissented and filed opinion.

1. Federal Courts ⇐818

Court of Appeals will review district court's decision to deny voluntary dismissal after defendant has filed answer for abuse of discretion. Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

2. Federal Civil Procedure ⇐1700

Absent legal prejudice to defendant, district court normally should grant voluntary dismissal after defendant has filed answer. Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

3. Federal Civil Procedure ⇐1700

In determining whether defendant would suffer legal prejudice from voluntary dismissal after defendant has filed answer, district court should consider, among other relevant factors, defendant's effort and expense in preparing for trial, excessive delay and lack of diligence on part of plaintiff, insufficient explanation of need for dismissal, and present stage of litigation. Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

4. Federal Civil Procedure ⇐1700

Each factor considered in determining whether defendant would suffer legal prejudice from voluntary dismissal after defendant has filed answer need not be resolved in favor of plaintiff for dismissal to be appropriate, nor need each factor be resolved in favor

6. We decline to address whether any portion of the non-trust lands opened in 1905 might still constitute Indian country under section 1151(b) as a "dependent Indian community" because

that question is not properly before the court. The district court may be asked to consider the question upon remand.

of defendant for denial of motion to be proper. Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

5. Federal Civil Procedure ⚖️1700

In determining whether to grant voluntary dismissal after defendant has filed answer, district court should endeavor to insure that substantial justice is afforded to both parties. Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

6. Federal Civil Procedure ⚖️1693, 1700

In determining whether to grant voluntary dismissal after defendant has filed answer, court must consider equities not only facing defendant, but also those facing plaintiff; court's refusal to do so is denial of full and complete exercise of judicial discretion. Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

7. Federal Civil Procedure ⚖️1700

When considering motion to voluntarily dismiss case after defendant has filed answer, court must remember that the important factors in determining legal prejudice are those involving parties, not court's time or effort spent on case. Fed.Rules Civ.Proc. Rule 41(a)(2), 28 U.S.C.A.

8. Federal Civil Procedure ⚖️1700

Court abuses its discretion when it denies motion to voluntarily dismiss case after defendant has filed answer based on its own inconvenience. Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

9. Federal Civil Procedure ⚖️1700

District court abused its discretion when it denied mother's motion to voluntarily dismiss Hague Convention petition for return of child to Sweden solely on grounds of her contempt of its order not to remove child, and without considering any additional circumstances, including merits of motion. International Child Abduction Remedies Act, § 4, 42 U.S.C.A. § 11603; Fed.Rules Civ. Proc.Rule 41(a)(2), 28 U.S.C.A.

10. Federal Civil Procedure ⚖️1693

Whether motion to voluntarily dismiss case after defendant has filed answer may be granted is matter initially left to district

court's discretion, but such discretion does not excuse court's failure to exercise any discretion, nor does it save unpermitted exercise of discretion from reversal. Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

11. Federal Courts ⚖️812

Court abuses its discretion when it fails to consider applicable legal standard or facts upon which exercise of its discretionary judgment is based.

12. Federal Courts ⚖️937.1

Although district court's failure to apply correct legal standard when it denied mother's motion to voluntarily dismiss Hague Convention petition for return of child to Sweden could serve as basis for remand, Court of Appeals would determine merits of mother's motion, as no dispute regarding underlying facts existed and record was adequate to address issues of concern. Fed. Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

13. Federal Civil Procedure ⚖️1700

Mother should have been allowed to voluntarily dismiss her Hague Convention petition for return of child to Sweden, after mother had taken child to Sweden and father had filed his own Hague Convention petition, in Sweden, for return of child to United States, as father would not suffer legal prejudice from dismissal, claims and defenses of both mother and father could be more fairly adjudicated in Sweden, and failure to grant motion to dismiss could create new incentive for parents to flee Hague Convention proceedings in hope of obtaining second, more favorable Convention determination in another country. International Child Abduction Remedies Act, § 4, 42 U.S.C.A. § 11603; Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

14. Federal Civil Procedure ⚖️1701.1

For purposes of determining whether mother was entitled to voluntarily dismiss her Hague Convention petition for return of child to Sweden, there was no improper delay or lack of diligence on mother's part sufficient to legally prejudice father. International Child Abduction Remedies Act, § 4, 42 U.S.C.A. § 11603; Fed.Rules Civ.Proc. Rule 41(a)(2), 28 U.S.C.A.

15. Federal Civil Procedure ⇐1700

For purposes of determining whether mother was entitled to voluntarily dismiss her Hague Convention petition for return of child to Sweden, reasons mother gave for granting motion to dismiss, including contention that petition was moot because child was no longer in United States, that Hague Convention allowed for dismissal of proceedings under such circumstances, and that father had initiated duplicative action in Sweden, were not insufficient such that they prejudiced father. International Child Abduction Remedies Act, § 4, 42 U.S.C.A. § 11603; Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

16. Federal Civil Procedure ⇐780

Hague Convention petition father filed in Sweden for return of his child to United States would not be construed as counterclaim to mother's prior Hague Convention petition, filed in United States, for return of child to Sweden, as father's claims were asserted in court of another jurisdiction. International Child Abduction Remedies Act, § 4, 42 U.S.C.A. § 11603; Fed.Rules Civ.Proc.Rule 8(c), 28 U.S.C.A.

17. Federal Civil Procedure ⇐1700

In determining whether to grant mother's motion to voluntarily dismiss Hague Convention petition for return of child to Sweden, which motion was based, in part, on father's subsequent Hague Convention petition filed in Sweden, district court should have considered importance of proper, uniform interpretation of Hague Convention, along with Convention's purpose. International Child Abduction Remedies Act, § 4, 42 U.S.C.A. § 11603; Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

18. Parent and Child ⇐18**Treaties** ⇐13

Under contemplated procedures of Hague Convention, district court, in ruling on mother's Hague Convention petition for return of child to Sweden, should not have considered mother's removal of child from United States to Sweden in violation of court order, as father had not filed cross-petition to adjudicate propriety of mother's removal.

International Child Abduction Remedies Act, § 4(b, e), 42 U.S.C.A. § 11603(b, e).

19. Contempt ⇐70

Court's interest in ensuring party's compliance with its orders is great one, enforceable by fines or imprisonment.

20. Contempt ⇐70

When imposing civil contempt sanctions, court is obliged to use least possible power adequate to end proposed.

21. Parent and Child ⇐18**Treaties** ⇐13

District court should not have denied mother's motion to voluntarily dismiss Hague Convention petition for return of child to Sweden, as civil contempt sanction for mother's conduct in taking child back to Sweden in violation of court order, as other measures were available to compel compliance with order, such as personal sanctions against mother, or possibly staying decision pending child's return. International Child Abduction Remedies Act, §§ 4, 5, 42 U.S.C.A. §§ 11603, 11604.

Daniel F. Bertch (Billie C. Nielsen, with him on the brief), of Bertch & Birch, Salt Lake City, UT, for Petitioner-Appellant.

Gary L. Paxton (Rodney G. Snow with him on the briefs) of Clyde, Snow & Swenson, P.C., Salt Lake City, UT, for Respondent-Appellee.

Before BRORBY, BARRETT and MURPHY, Circuit Judges.

BRORBY, Circuit Judge.

Ms. Ohlander appeals the United States District Court for the District of Utah's judgment denying her petition for the return of her daughter Julia to Sweden under the Hague Convention, ordering Julia's return to Utah, denying her two motions to withdraw and dismiss her petition, denying her motions to stay enforcement of the judgment, and a subsequent judgment denying her Fed. R.Civ.P. 60(b) motion to set aside the judg-

ment.¹ Applying the standards under Fed. R.Civ.P. 41(a)(2) in the Hague Convention context, we determine the district court abused its discretion in denying the motion to dismiss. We reverse and remand to the district court with instructions to dismiss Ms. Ohlander's petition.

I. BACKGROUND

The Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"), as implemented by both the United States Congress through the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11610 (1994), and Sweden, was adopted by the signatory nations "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." Hague Convention on the Civil Aspects of International Child Abduction, Dec. 23, 1981, Preamble, 51 Fed. Reg. 10494, 10,498 (1986). The Convention is meant to provide for a child's prompt return once it has been established the child has been "wrongfully removed" to or retained in any affiliated state. *Id.*, art. 1, 51 Fed. Reg. at 10498.

Under the Convention, a removal or retention is "wrongful" if:

- a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for removal or retention.

Id., art. 3, 51 Fed. Reg. at 10498. Once a removal is deemed "wrongful," "the authority concerned shall order the return of the child." *Id.*, art. 12, 51 Fed. Reg. at 10499. However, the Convention provides for several exceptions to return if the person opposing return can show any of the following: 1) the

person requesting return was not, at the time of the retention or removal, actually exercising custody rights or had consented to or subsequently acquiesced in the removal or retention, *id.*, art. 13a, 51 Fed. Reg. at 10499, 42 U.S.C. § 11603(e)(2)(A); 2) the return of the child would result in grave risk of physical or psychological harm to the child, *id.*, art. 13b, 42 U.S.C. § 11603(e)(2)(A); 3) the return of the child "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms," *id.*, art. 20, 51 Fed. Reg. at 10500, 42 U.S.C. § 11603(e)(2)(A); or 4) the proceeding was commenced more than one year after the abduction and the child has become settled in the new environment, *id.*, art. 12, 51 Fed. Reg. at 10499, 42 U.S.C. § 11603(e)(2)(B).

II. FACTS

Ms. Ohlander, a Swedish citizen, and Mr. Larson, a United States citizen, were married in Utah in 1989. In August 1990, their daughter Julia was born in Provo, Utah. During the Christmas holiday season of 1990–91, when Julia was five months old, the entire family traveled to Sweden to visit Ms. Ohlander's family with the intent to return to their Utah home in January 1991. After arriving in Sweden, Ms. Ohlander decided to remain in Sweden with Julia; Ms. Ohlander went into hiding with her daughter and severed contact with her husband. Mr. Larson returned to Utah alone in mid-January 1991.

By April 1991, Mr. Larson had reestablished contact with Ms. Ohlander. In June 1991, with Julia now almost a year old, Ms. Ohlander returned to Utah to be with Mr. Larson. Ms. Ohlander and Julia remained with Mr. Larson for seven months. On January 13, 1992, Ms. Ohlander returned with Julia to Sweden without Mr. Larson's consent.

By November 1993,² Julia had resided continuously in Sweden for almost two years, and was a little over three years old. Mr.,

1. Ms. Ohlander's appeal of the district court's denial of her motion to set aside the judgment under Fed R Civ P 60(b) was consolidated with the direct appeal

2. Between January 1992 and November 1993,³ Ms. Ohlander and Mr. Larson were participating in divorce and custody proceedings taking place in Sweden.

Larson returned to Sweden with his new wife to see Julia, and during one visitation, applied the law of "grab and run" taking Julia back to Utah without Ms. Ohlander's consent. In January 1994, Ms. Ohlander filed a petition seeking her daughter's return pursuant to the Hague Convention in the United States District Court for the District of Utah. Ms. Ohlander also secured an *ex parte* Order for Issuance of Warrant in Lieu of Writ of Habeas Corpus from the district court, directing peace officers to take Julia into protective custody and to release her to Ms. Ohlander, but prohibiting Ms. Ohlander from removing Julia from Utah pending further order. Mr. Larson delivered Julia to Ms. Ohlander on January 30, 1994, and on February 1, 1994, Ms. Ohlander disobeyed the court's order and applied her own version of the law of "grab and run" by returning to Sweden with Julia.

In August 1994, shortly after Julia's fourth birthday, the district court entered an order finding Ms. Ohlander in contempt and directing her to return Julia to the United States within thirty days. Ms. Ohlander failed to comply. Two months later, in October 1994, following Ms. Ohlander's and Julia's return to Sweden, Mr. Larson filed a Convention application for Julia's return with the United States Central Authority, which was forwarded to Sweden's Central Authority.³ Ms. Ohlander then filed a motion, pursuant to Fed. R.Civ.P. 41(a)(2), to dismiss her district court petition, based, in part, on the Convention's art. 12, which authorizes a judicial authority to stay or dismiss the application or judicial proceedings seeking a child's return.⁴ Hague Convention, art. 12, 51 Fed.Reg. at 10499. In January 1995, prior to the hearing on Ms. Ohlander's motion, Mr. Larson petitioned the Sweden court pursuant to the Convention for Julia's return on the ground

Ms. Ohlander had "wrongfully removed" her from Utah.⁵

The United States district court conducted a hearing on Ms. Ohlander's motion to dismiss. During that hearing, the United States district court was informed of Mr. Larson's Hague Convention proceeding in Sweden. The district court denied the motion to dismiss solely on the basis of Ms. Ohlander's contempt of its order not to remove Julia from Utah. Ms. Ohlander later orally renewed her motion to dismiss, which the district court denied on the same grounds.

The district court conducted a bench trial on Ms. Ohlander's Hague Convention petition to determine the issues of habitual residence and wrongful removal pursuant to the Convention. However, neither Ms. Ohlander nor Julia was present for the hearing, nor did they testify by other means. Ms. Ohlander presented no live witnesses and relied only on the stipulated facts set out in the Pretrial Order. Ultimately, the district court found Julia was at all times a "habitual resident" of Utah, and as such, Ms. Ohlander's retention of Julia in Sweden in 1991, and her removals of Julia from Utah in 1992 and 1994 were all "wrongful" under the Convention. Accordingly, the district court ordered Julia's immediate return to Utah and requested the aid of the Contracting States in achieving that goal.

Following the United States district court's decision, the Sweden courts held hearings to determine the merits of Mr. Larson's petition. Both Mr. Larson and Ms. Ohlander were present during the Sweden court proceeding. The Sweden Supreme Administrative Court held Julia's habitual residence changed from Utah to Sweden after she had lived in Sweden for twelve months following the January 1992 abduction—a decision di-

3. 42 U.S.C. § 11602 distinguishes between applications and petitions filed under the Convention. A petition exists upon a person filing for relief in court, while an application exists upon a person filing with the United States' or any other country's Central Authority for a child's return. 42 U.S.C. § 11602(1), (4).

4. Specifically, the Convention's art. 12 states: Where 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 the proceedings, or dismiss the application for the return of the child.

Hague Convention, art. 12, 51 Fed.Reg. at 10499.

5. Presumably, Mr. Larson filed the petition in addition to the application to prevent Ms. Ohlander from asserting the "settled environment" defense as it pertained to Ms. Ohlander's 1994 removal. This defense is discussed *infra* at p. 1540.

rectly in conflict with the United States district court's holding.

Once the Sweden court had made its ruling, Ms. Ohlander filed a motion to stay enforcement of the United States district court's order, and a motion to set aside the United States' judgment under Fed.R.Civ.P. 60(b). The United States district court denied the motions, again solely on the basis of Ms. Ohlander's contempt. We are presented, therefore, with two international decisions standing in direct conflict, and it is this contradiction we attempt to resolve for both the present case and for future cases.

III. DISCUSSION

This case presents issues novel to this court, and according to our research, novel to this country. Our aim is to provide courts with guidance in future similar cases, namely, where two civil actions under the Hague Convention on the Civil Aspects of International Child Abductions are filed in disparate courts due to a child's removal from the court of first jurisdiction. Also, our aim is to give meaning to the Convention's intended purpose of discouraging parents from fleeing with their children in search of a favorable decision. Notably, we are faced not only with issues of the proper interpretation of bare text in the form of the Hague Convention treaty, but also with the plight of a now six-year-old girl to whom the law of "grab and run" repeatedly has been applied.

We therefore must examine the following competing interests of: the district court ensuring compliance with its orders; the procedural conduct of the parties; and most important, the Convention's intent and our duty to see that intent justly carried out. Against this backdrop, we attempt to untangle the Gordian knot the parents, together, have seen fit to tie.

IV. MOTION TO DISMISS

Even though Ms. Ohlander appeals several of the district court's rulings, our decision on the motion to dismiss pursuant to Fed. R.Civ.P. 41(a)(2) is dispositive. Thus, we need not address the remaining issues. We therefore turn our focus to whether the district court abused its discretion in denying

Ms. Ohlander's motion to dismiss pursuant to Fed.R.Civ.P. 41(a)(2).

A. Relevant Facts

Ms. Ohlander's first motion to dismiss was filed shortly after Mr. Larson filed his Hague application for Julia's return to Utah with the United States Central Authority. Ms. Ohlander's counsel raised her second motion to dismiss orally during the bench trial. Relying on the Convention's art. 12, Ms. Ohlander argued in her first motion to dismiss that because Julia was no longer in the United States and because Mr. Larson had initiated his own Hague Convention application, the United States district court should dismiss the petition for Julia's return to Sweden. By the time the United States district court heard arguments regarding the first motion to dismiss, Mr. Larson had initiated his own petition in the Sweden courts regarding the wrongfulness of Julia's removal from the United States. The district court was aware of the duplicative judicial action in Sweden. Notwithstanding its knowledge of Mr. Larson's Hague Convention proceedings in Sweden, the district court summarily denied Ms. Ohlander's motion solely on the basis of Ms. Ohlander's contempt stating:

I'm not going to grant the Motion to Dismiss and I'm not going to grant it simply because this woman, the petitioner, in my opinion, isn't in a position to ask me to do that, because she's in violation of the orders of this Court. She is simply in violation. She invoked the jurisdiction. She asked for our help, and then she, contrary to the order of the Court, ran.

In her second motion to dismiss, Ms. Ohlander relied again on the Convention's art. 12, the fact that Julia was no longer in the United States, and the fact that Mr. Larson had initiated judicial proceedings in Sweden. The district court again denied Ms. Ohlander's second motion to dismiss due to her contumacious conduct.

B. Relevant Factors Considered Under 41(a)(2)/Standard of Review

[1-4] Once a defendant files an answer, as was the case here, a plaintiff may voluntarily dismiss an action only upon order of

the court. Fed.R.Civ.P. 41(a)(2). We review the district court's decision to deny a voluntary dismissal under such conditions for abuse of discretion. *American Nat'l Bank & Trust Co. v. Bic Corp.*, 931 F.2d 1411, 1412 (10th Cir.1991). Absent "legal prejudice" to the defendant, the district court normally should grant such a dismissal. *See Andes v. Versant Corp.*, 788 F.2d 1033, 1036 (4th Cir. 1986) (voluntary dismissal "should not be denied absent substantial prejudice to the defendant"); *McCants v. Ford Motor Co.*, 781 F.2d 855, 856-57 (11th Cir.1986) ("in most cases a dismissal should be granted unless the defendant will suffer clear legal prejudice"). The parameters of what constitutes "legal prejudice" are not entirely clear, but relevant factors the district court should consider include: the opposing party's effort and expense in preparing for trial; excessive delay and lack of diligence on the part of the movant; insufficient explanation of the need for a dismissal; and the present stage of litigation. *Phillips U.S.A., Inc. v. Allflex U.S.A., Inc.*, 77 F.3d 354, 358 (10th Cir.1996). Each factor need not be resolved in favor of the moving party for dismissal to be appropriate, nor need each factor be resolved in favor of the opposing party for denial of the motion to be proper. *Id.* at 358.

The above list of factors is by no means exclusive. *Id.* at 358. Any other relevant factors should come into the district court's equation. In fact, in the context of this Hague Convention proceeding, the district court was impressed with a duty to exercise its discretion by carefully appraising any additional factors unique to the context of this case, including the interests in comity, uniform interpretation of the Convention and the importance of giving import to the Hague Convention's intended purpose as relevant to the motion to dismiss.

[5, 6] The district court should endeavor to insure substantial justice is accorded to both parties. 9 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2364 at 278 (2d ed. 1994). A court, therefore, must consider the equities not only facing the defendant, but also those facing the plaintiff; a court's refusal to do so is a denial of a full and complete exercise of

judicial discretion. *Id.* at 297. In a complex, emotional case such as this, it is critically important when considering a motion to dismiss, the court give the equities of the plaintiff the attention deserved.

[7, 8] Finally, when considering a motion to dismiss, a court must remember the important factors in determining legal prejudice are those involving the parties, not the court's time or effort spent on the case. *Clark v. Tansy*, 13 F.3d 1407, 1411 (10th Cir.1993). A court abuses its discretion when denying a motion to dismiss under Rule 41(a)(2) based on its inconvenience. *Id.* at 1411.

[9-11] In sum, the district court was obligated to consider the novelty of the circumstances surrounding this case. Instead, the court did not consider the merits of Ms. Ohlander's motion due exclusively to her contumacious conduct. It is true Ms. Ohlander blatantly violated the court's orders and absconded to Sweden with Julia in tow. We refuse to condone such conduct. However, neither can we condone a court ignoring its duty to consider the merits of a motion to dismiss simply because a party has violated its orders. Whether a motion to dismiss under Rule 41(a)(2) may be granted is a matter initially left to the district court's discretion, but such discretion does not excuse a court's failure to exercise any discretion, nor does it save an unpermitted exercise of discretion from reversal. *Alamance Indus., Inc. v. Filene's*, 291 F.2d 142, 146-47 (1st Cir.), *cert. denied*, 368 U.S. 831, 82 S.Ct. 53, 7 L.Ed.2d 33 (1961). A clear example of an abuse of discretion exists where the trial court fails to consider the applicable legal standard or the facts upon which the exercise of its discretionary judgment is based. *See McNickle v. Bankers Life & Cas. Co.*, 888 F.2d 678, 680 (10th Cir.1989) (reviewing a district court's 60(a) motion under an abuse of discretion standard). We believe the district court's decision to deny Ms. Ohlander's motion solely on the grounds of her contempt and without considering any additional circumstances, amounts to a failure to exercise discretion, and is, consequently, an abuse of that discretion.

C. Merits of Ms. Ohlander's 41(a)(2) Motion

1. Traditional Factors

[12] Although the district court's failure to apply the correct legal standard could serve as a basis for remand, in the interest of efficiency and judicial economy, and in the interest of providing immediate guidance as to the most appropriate direction of this case in light of the Convention's purpose, we turn to the merits of Ms. Ohlander's motion to dismiss. *Clark*, 13 F.3d at 1411-13 (considering on appeal the merits of motion to dismiss after district court abused its discretion); *Park County Resource Council v. United States Dept. of Agric.*, 817 F.2d 609, 617-18 (10th Cir.1987) ("Although failure to apply correct legal standard could be basis for remand to the district court, we have found that remand is not necessary where there is no dispute regarding the underlying facts and where it is in the interest of judicial economy and efficiency to decide the matter."); see also *McCord v. Bailey*, 636 F.2d 606, 613 (D.C.Cir.1980) (although inadequate findings and conclusions may be remanded to the district court for supplementation, appellate court will not remand for more specific findings if doing so will consume judicial resources without serving any purpose). We believe, as is obvious from our remaining analysis, no dispute regarding the underlying facts exists and the existing record is adequate to address the issues of concern.

[13, 14] Mr. Larson argues that to grant Ms. Ohlander's motion would subject him to legal prejudice. More specifically, Mr. Lar-

son argues he would be unfairly prejudiced by Ms. Ohlander's excessive delay and lack of diligence, and by the lack of a sufficient explanation in favor of dismissal. See *Allflex*, 77 F.3d at 358. Mr. Larson argues Ms. Ohlander's filing of her motion to dismiss eleven months after the initiation of the proceedings and after Mr. Larson had requested a final pretrial hearing constitutes delay and lack of diligence. However, while Ms. Ohlander moved to dismiss her petition eleven months after she initiated the proceeding, our examination of the record illustrates Ms. Ohlander filed her motion to dismiss *only after* Mr. Larson had filed his application for Julia's return with the United States Central Authority. Therefore, the most persuasive reason to file a motion to dismiss did not arise until eleven months following the initial proceeding's initiation. As a result, the timing of Ms. Ohlander's motion could not constitute excessive delay sufficient to legally prejudice Mr. Larson. Moreover, the record shows Ms. Ohlander's counsel was actively and diligently moving forward with the case regardless of Ms. Ohlander's absence. Counsel was present at and participated in every hearing.⁶ Therefore, we conclude there was no improper delay or lack of diligence on Ms. Ohlander's part sufficient to legally prejudice Mr. Larson.

[15] Further, we believe the reasons Ms. Ohlander has given for granting the motion to dismiss are not insufficient such that they prejudice Mr. Larson. In her motions to dismiss, Ms. Ohlander argued her petition was moot and because Julia was no longer in

6. The dissent opines our statement here "is a conclusory statement lacking support in the record" because between the time Ms. Ohlander initiated the Convention proceeding and filed her motion to dismiss, Ms. Ohlander "did virtually nothing to affirmatively move her case along." Unfortunately, this court has yet to explicitly define "diligence" in the context of a Rule 41(a)(2) motion to dismiss. While the dissent purports an "affirmative act" requirement, the cases from this circuit touching on the issue characterize diligence quite differently. *Allflex*, 77 F.3d at 358 (movant's request for additional time to respond to proffered facts and to conduct further discovery constituted lack of diligence); *Clark*, 13 F.3d at 1412 (movant's failure to exhaust state claims for purposes of habeas review "cannot be construed as lack of diligence"); see

also, *United States v. Outboard Marine Corp.*, 789 F.2d 497, 504 (7th Cir.1986) (lack of diligence may be shown by evidence of bad faith or unwarranted delay). We are not certain what "affirmative acts" the dissent would require, and to the extent it would require a movant to file additional motions prior to a motion to dismiss, all in the name of "affirmative acts," we disagree. In fact, affirmative acts to prolong litigation more typically provide a basis for finding excessive delay and lack of diligence. See, e.g., *Allflex*, 77 F.3d at 358. The record before us shows counsel was present at and fully participated in all hearings and, outside the motions to dismiss, which were timely filed, did not cause undue delay. Consequently, there is adequate support in the record to reach our conclusion.

Utah, the Convention's art. 12 allowed for a stay or dismissal of the proceedings. Ms. Ohlander also relied on the fact Mr. Larson himself initiated a duplicative action in Sweden as further support for the imposition of the Convention's art. 12 dismissal provision. Certainly, the first two reasons alone are insufficient to support a motion to dismiss and could give parents an undue incentive to flee from Hague Convention proceedings. However, as discussed at length below, we place greater weight on Ms. Ohlander's proffered reasons that Mr. Larson initiated a second action in Sweden and that the Convention's art. 12 lends support for dismissing the United States proceeding. Ms. Ohlander's reasons for requesting the motion to dismiss are not insufficient such that they legally prejudice Mr. Larson. Rather, as Ms. Ohlander emphasizes, by initiating a judicial proceeding in Sweden Mr. Larson himself, along with the Convention's terms, provided the most persuasive reason to dismiss the United States district court proceeding. Mr. Larson is hard pressed to argue he is prejudiced by his own actions.

[16] Mr. Larson also argues the motion to dismiss should not be granted because his response to Ms. Ohlander's Hague Convention petition should be construed as a counterclaim. It is true a court may construe a pleading mistakenly designated as a defense as a counterclaim when justice requires. Fed.R.Civ.P. 8(c). However, because Mr. Larson filed his own Hague Convention petition in Sweden, we remain unconvinced jus-

tice requires us to construe Mr. Larson's response to Ms. Ohlander's petition as a counterclaim in this case. Mr. Larson chose to assert his claims in a court of another jurisdiction. Justice does not require us to tortuously construe his response to Ms. Ohlander's petition simply to retain jurisdiction over this matter. Had Mr. Larson wanted the United States courts to adjudicate his claim Ms. Ohlander wrongfully removed Julia from Utah, he would have been far better served by filing a cross-petition with the district court rather than initiating an entirely new proceeding in Sweden. Consequently, we refuse to construe Mr. Larson's response as a counterclaim.⁷

2. Additional Relevant Factors

[17] As already noted, given the unique circumstances of this case, the district court should have considered the importance of a proper, uniform interpretation of the Convention, along with a consideration of the Convention's purpose, when evaluating the merits of Ms. Ohlander's motion to dismiss. We now consider those factors.

a. Proper Interpretation of the Hague Convention's Procedures

When the district court considered whether Ms. Ohlander's removal of Julia from Utah was wrongful, it misconstrued the Convention's contemplated procedures. According to the Convention, once a petition is filed, a court should consider only whether a re-

dismissal once a child is removed, suggests the United States court retained jurisdiction even after Julia was removed from Utah.

Rather than relying on the original action, Mr. Larson initiated a second proceeding, which has resulted in a ruling contrary to his interests and which has resulted in two conflicting international decisions, a problem we must somehow address. Certainly, we are not punishing him by subjecting him to the results of the proceeding he, in fact, initiated. Further, the fact Mr. Larson attempted to limit the Sweden court's jurisdiction is of no moment. Once Mr. Larson filed the petition in the Sweden court, that court had proper jurisdiction to determine Julia's place of habitual residence regardless of the fact Mr. Larson attempted to limit the Sweden court's review to the 1994 removal. Hague Convention, art. 3, 51 Fed.Reg. at 10498.

7. The dissent claims that by relying on the fact Mr. Larson initiated the second proceeding in Sweden we are somehow "punishing" Mr. Larson for enlisting the aid of the Sweden courts. On the contrary, we are only holding Mr. Larson accountable for his actions. Even though Julia was no longer within the United States when Mr. Larson filed the petition in Sweden, the United States court retained jurisdiction to determine Julia's state of habitual residence. See 42 U.S.C. § 11603(b). The United States district court had jurisdiction over the original petition as the court "in the place where the child is located at the time the petition is filed." Therefore, even though Julia was removed, the United States Court retained jurisdiction to determine the child's place of habitual residence. Additionally, the permissive language of the Convention's art. 12 dismissal provision, which allows a court to stay or dismiss an action versus mandating a

spondent's removals of a child are wrongful. See Hague Convention, arts. 3, 12, 51 Fed. Reg. at 10498, 10499, 42 U.S.C. § 11603(b), (e). Here, antithetic to the Convention's intent as a whole, the court considered whether the *petitioner's* removals of the child were wrongful.

[18] When Ms. Ohlander petitioned the United States district court for Julia's return to Sweden, the issue before the court was whether Mr. Larson's removal of Julia from Sweden was wrongful pursuant to the Convention. Hague Convention, art. 3, 51 Fed. Reg. at 10498. Once Ms. Ohlander removed Julia from Utah, the issue became whether Ms. Ohlander's removals were wrongful. *Id.* By filing his own petition in the Sweden courts, Mr. Larson chose to adjudicate Ms. Ohlander's removals of Julia in the foreign court rather than in the United States district court. The district court's consideration of Ms. Ohlander's removal of Julia without Mr. Larson having filed a cross-petition in that court was contrary to the Convention's intended procedures.

Additionally, denial of Ms. Ohlander's motion to dismiss renders Ms. Ohlander's most relevant defense to Julia's return to Utah unavailable, namely, the "settled environment" defense. Hague Convention, art. 12, 51 Fed. Reg. at 10499, 42 U.S.C. § 11603(e)(2)(B). Under the Convention's plain terms, one defense to a child's return is showing the petition was filed a year after the child's removal or retention and that the child has become settled in his or her new environment. Hague Convention, art. 12, 51 Fed. Reg. at 10499, 42 U.S.C. § 11603(e)(2)(B). When Ms. Ohlander filed her petition, she was asking for Julia's return to Sweden; any defenses to Julia's return, under Article 12 or otherwise, were available only to the respondent, Mr. Larson. See Hague Convention, art. 12, 51 Fed. Reg. at

10499, 42 U.S.C. § 11603(e)(2)(B). Consequently, Ms. Ohlander could not, under the Convention's contemplated procedures, properly assert the "settled environment" defense. However, once Mr. Larson filed his own petition in Sweden seeking to adjudicate Ms. Ohlander's removal of Julia from Utah, Ms. Ohlander rightfully could assert the "settled environment" defense. Hague Convention, art. 12, 51 Fed. Reg. at 10499, 42 U.S.C. § 11603(e)(2)(B). Conversely, had Mr. Larson filed a cross-petition in the United States district court for Julia's return to Utah, rather than instigating an entirely new action in Sweden, Ms. Ohlander properly could have asserted her defenses in the United States district court. Since Mr. Larson chose to initiate a second Convention proceeding in Sweden, Sweden was the jurisdiction where the claims and defenses of both Ms. Ohlander and Mr. Larson could be more fairly adjudicated. Therefore, the proper interpretation of the Convention weighs in favor of dismissing the United States action and allowing the issues to be decided in Sweden.⁸

This result is further supported by the plain language of the Convention's art. 12, which states "where the judicial or administrative authority in the requested State has reason to believe the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child." Hague Convention, art. 12, 51 Fed. Reg. at 10499. While this language is permissive rather than mandatory, its words merit a court's consideration when denying a motion to dismiss. Congress has declared the importance of "the need for uniform international interpretation of the Convention." 42 U.S.C. § 11601(b)(3)(B). Article 12 helps to ensure two disparate courts will not reach conflicting decisions by encouraging courts to dismiss or stay their actions where appropriate. This case poses a perfect example of the need for Article 12's dismissal provision:

8. The dissent takes issue with our interpretation of the availability of this defense to Ms. Ohlander. Apparently, the dissent interprets the Convention as restricting the Sweden court's review to Ms. Ohlander's 1994 removal of Julia and not to allow review of Ms. Ohlander's additional retentions and removals of Julia, particularly Ms. Ohlander's 1992 removal of Julia from Utah. We disagree with this interpretation. The Conven-

tion is intended to provide finality to the parties, and it is our duty to see this intent carried out. We note this is an extremely difficult case, dealing with the Convention's interpretation, an area singularly lacking in helpful precedent or congressional guidance. It is merely our duty to resolve this case as best we can in accordance with our interpretation of the Convention and to give import to the intentions of that Convention.

the United States district court had knowledge that Julia had been taken to Sweden, and that a second action initiated by Mr. Larson was pending in Sweden, where all the parties, including the child, were present. Therefore, we conclude the adherence to intended Hague Convention procedures support Ms. Ohlander's motion to dismiss.

b. Intent of the Hague Convention

Failing to grant the motion to dismiss where a second duplicative action has been filed in a different country would potentially render the Hague Convention meaningless. Part of the Convention's intent is "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States." Hague Convention, art. 1(b), 51 Fed.Reg. at 10498. Prior to the Convention, when faced with an unfavorable custody decision, a parent would flee to another country in search of a custody decision in his or her favor. This would often result in two conflicting custody decisions without guidance as to which country's custody decision had preference. The Hague Convention was drafted with the intent to remove forever the incentive for a parent to flee across borders to obtain a favorable ruling. Letter of Transmittal from President Ronald Reagan (Oct. 30, 1985), reprinted in 51 Fed.Reg. 10494, 10495 (1986); Pub. Notice 957, 51 Fed.Reg. 10494, 10505 (1986). Under the Convention, a child is to be expediently returned to his or her state of habitual residence "so that a court there can examine the merits of the custody dispute and award custody in the child's best interests." Pub. Notice 957, 51 Fed.Reg. at 10505. As a result, the Convention was meant, in part, to lend priority to the custody determination hailing from the child's state of habitual residence.

While the Convention proceedings in this case certainly have not achieved this intended result, a refusal to dismiss this action only exacerbates the problem. By failing to dismiss the United States action we would allow to stand two conflicting decisions regarding

Julia's state of habitual residence, which could very well require a Hague Convention to determine which Hague Convention determination is valid. This, of course, is absurd. By dismissing this action, we instead require these and future litigants to choose which jurisdiction will determine a child's state of habitual residence, thereby salvaging what we can of the Convention's intended purpose.⁹

Failing to grant the motion to dismiss also could create a new incentive for parents to flee Hague Convention proceedings in the hope of obtaining a second, more favorable Convention determination in another country. We then would be left to solve the riddle of which competing ruling in each case is valid. This is a task we refuse to acquire. Rather, we believe the parties' interests would be best represented and judicial resources best spent if parents engaged in this type international custody battle are required to resolve their dispute in one jurisdiction or the other. Holding Mr. Larson and future litigants to one jurisdiction gives import to the Convention's intended meaning.

c. Ms. Ohlander's Contempt

[19-21] Certainly, the court's interest in ensuring a party's compliance with its orders is a great one, enforceable by fines or imprisonment. *Spallone v. United States*, 493 U.S. 265, 276, 110 S.Ct. 625, 632-33, 107 L.Ed.2d 644 (1990). However, a court is obliged to use the "least possible power adequate to the end proposed." *Id.* at 276, 110 S.Ct. at 632 (quoting *United States v. Yonkers*, 856 F.2d 444, 454 (2d Cir.1988), and *Anderson v. Dunn*, 6 Wheat. 204, 231, 5 L.Ed. 242 (1821)). Here, certainly other measures were available to compel compliance, such as personal sanctions against the mother, or possibly staying a decision pending the child's return.

Under the provisions of the International Child Abduction Remedies Act, the district court has the authority to implement mea-

is precisely the "potential" conflict between different countries' custody decisions that made the Convention necessary.

9. The dissent opines our reliance on this factor is ironic because the conflict between the two decisions was merely "potential" at the time Mr. Larson filed the duplicative action in Sweden. It

asures to "prevent the child's further removal or concealment before the final disposition of the petition." 42 U.S.C. § 11604. Given Ms. Ohlander's history of removing Julia from the United States, to prevent Ms. Ohlander from repeating this behavior, perhaps the district court should have imposed more rigid measures, such as requiring Ms. Ohlander to surrender both her and Julia's passports to the clerk of court prior to receiving physical custody of Julia, or leaving custody with Mr. Larson pending the petition's outcome. See *Currier v. Currier*, 845 F.Supp. 916, 923 (D.N.H.1994) (district court requiring petitioner surrender her and her children's passport to the court's clerk pending appeal). However, if such measures are not imposed, or if they fail, the court is not thereby released of its duty to consider the merits of the parties' cases when considering how best to enforce compliance. In sum, there is no doubt Ms. Ohlander's actions were contemptible, for she brazenly thumbed her nose at the United States district court's order not to remove Julia from Utah; nevertheless, such conduct does not warrant a court denying a motion to dismiss solely on that ground.

In sum, we hold it necessary to dismiss this action. Mr. Larson does not suffer legal prejudice from such a dismissal, and the balance of relevant factors, along with the intent of the Convention, weigh in favor of dismissal.

We **REVERSE** the district court and **REMAND** with instructions to dismiss the petition without prejudice.

MURPHY, Circuit Judge, dissenting.

I concur in the majority's conclusion that the district court erred in failing to consider the governing legal standards and relevant facts relating to Ms. Ohlander's Fed.R.Civ.P. 41 motion to dismiss. Rather than resolve the Rule 41 issue ourselves, however, we should remand this case to the district court for an appropriate Rule 41 evaluation and an accompanying adequate development of the

1. As discussed on pages 1534-35, the only other factor the majority articulates in favor of Ms. Ohlander's motion is its conclusory statement, lacking support in the record, that there was no excessive delay and lack of diligence on Ms.

record in light of the new law established by this court's opinion. Therefore, I dissent from the majority's resolution of the motion to dismiss on the merits and its failure to remand.

A. Rule 41(a)(2) Factors

The trial court denied Ms. Ohlander's Fed. R.Civ.P. 41(a)(2) motion to dismiss for the sole reason that Ms. Ohlander was in contempt of court. In doing so, the court failed to consider the appropriate legal standards under Rule 41(a)(2). Although the trial court could properly consider Ms. Ohlander's contemptuous conduct, it was also required to evaluate other governing legal criteria. *McNickle v. Bankers Life & Cas. Co.*, 888 F.2d 678, 680 (10th Cir.1989) (noting trial court errs when it fails to consider applicable legal standard or facts on which exercise of discretionary judgment is based). Its failure to do so requires reversal.

Ironically, the majority has reversed the district court for refusing to grant Ms. Ohlander's motion for the sole reason that she was in contempt of court, yet ruled *de novo* that Ms. Ohlander's motion should be granted for the sole reason that Mr. Larson initiated his own Hague Convention proceedings.¹ The district court was required to evaluate fairly all Rule 41 factors; we should similarly be bound. An adequate record of remand, however, would be necessary.

In evaluating a Rule 41(a)(2) motion to dismiss, a court must consider the prejudice to the non-moving party. *Clark v. Tansy*, 13 F.3d 1407, 1411 (10th Cir.1993). In *Tansy*, we adopted the following factors to assess "legal prejudice" to the opposing party: (1) the non-moving party's effort and expense in preparation for trial; (2) the moving party's delay and lack of diligence in prosecuting the action; and (3) insufficient explanation of the need to allow a dismissal. *Clark*, 13 F.3d

Ohlander's part in bringing her motion. Stripped of this unsupported assertion, it is evident that the majority's outcome rests only on the desire to avoid a potentially conflicting decision from another sovereign state.

at 1411. This list is not exhaustive; a court may also consider other relevant factors in its Rule 41(a)(2) analysis. *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 358 (10th Cir.1996) (noting above factors are not exclusive, but instead are guides for district court).

The record does not address Mr. Larson's effort and expense of preparation for trial. Ms. Ohlander did not file her motion to dismiss, however, until Mr. Larson had filed a request for a final pretrial conference, suggesting that Mr. Larson had completed substantial trial preparation. If so, this would weigh against granting a motion to dismiss.

As to the second *Tansy* factor, the majority states that "the record shows Ms. Ohlander's counsel was actively and diligently moving forward with the case regardless of Ms. Ohlander's absence." Maj. Op. at 1538. A review of the docket sheet, the only record of Ms. Ohlander's litigation activity, undermines this assertion. The docket reveals that Ms. Ohlander waited almost a year after initiating her action before filing her motion to dismiss. During this time she did virtually nothing to affirmatively move her case along; instead, she merely responded through counsel to Mr. Larson's efforts to obtain a contempt order and the return of Julia to Utah. Thus, if anything, the limited record before us supports the conclusion that Ms. Ohlander did not diligently prosecute this action. Indeed, her conduct in absconding with Julia in violation of the court order belies a motivation to move her case forward. A remand would be useful on this point to explore whether she or her counsel made any efforts to prosecute the case that do not now appear in the record.

The majority also opines that because Ms. Ohlander filed her motion to dismiss after Mr. Larson filed his application with the United States Central Authority, "the timing of Ms. Ohlander's motion could not constitute

excessive delay sufficient to legally prejudice Mr. Larson." Maj. Op. at 1538. The logic of this statement is unclear. The filing of her motion in no way reflects her pre-filing diligence in prosecuting her case once she removed the child from the United States in violation of the district court's order. Indeed, Mr. Larson's application with the United States Central Authority is absolutely irrelevant to an evaluation of whether Ms. Ohlander diligently pursued her separately filed action before the United States District Court.

Finally, Ms. Ohlander did not provide a sufficient explanation of her need for dismissal. Ms. Ohlander gave three reasons for her Rule 41 motion, all derived from her fleeing with the child in violation of the district court's order and her defiance of the district court's subsequent order that the child be returned to Utah. None of Ms. Ohlander's reasons warrant dismissal of her action. The majority forthrightly acknowledges that granting Ms. Ohlander's motion based on her first two reasons (that her petition was moot, and the child was no longer in the state of Utah) would create a perverse incentive for others to use United States courts to obtain physical control of their children and then unlawfully flee the United States. Thus, these reasons concededly provide no support for Ms. Ohlander's motion.

The majority concludes that Ms. Ohlander's third reason for dismissal, Mr. Larson's application to the Swedish Authority and his subsequent petition to the Swedish court, "provided the most persuasive reason to dismiss the United States district court proceeding." Maj. Op. at 1539. Punishing Mr. Larson for enlisting the aid of the only sovereignty with physical control of his child, however, ignores the practical and emotional dilemma with which Mr. Larson was faced. Litigating this matter in the United States could not provide Mr. Larson what he sought most: contact with his child. With his child in Sweden, albeit unlawfully, Mr. Larson had no real alternative but to seek Swedish assistance.² Otherwise, he was faced with the devastating potential of a lingering loss of contact with his daughter. In addition, Mr.

2. As noted on pages 1535-36, his filing in Sweden was also mandated by the United States enabling legislation for the Hague Convention,

the International Child Abduction Remedies Act, which provides jurisdiction only to courts "in the

Larson had strategic litigation reasons for filing in Sweden when he did. The Hague Convention allows a parent who has fled even unlawfully with a child to assert a settled environment defense to a petition for return of a child if the petition is not filed within one year from the date the child is taken. Hague Convention on the Civil Aspects of International Child Abduction, Dec. 23, 1981, art. 12, 51 Fed.Reg. 10494, 10499 (1986). Mr. Larson, therefore, had only one year to file if he wanted to prevent Ms. Ohlander from creating this defense by her unlawful flight. Under these circumstances, Mr. Larson's filing in Sweden does not in any way compel the dismissal of the United States action.

B. Additional Factors

1. Appropriate Forum

The majority maintains that Sweden was "the jurisdiction where the claims and defenses of both Ms. Ohlander and Mr. Larson could be more fairly adjudicated." Maj. Op. at 1540. Specifically, the majority bases its preference for a Swedish adjudication on the presence of all the parties, including Julia, in Sweden, and its view that only in Sweden could Ms. Ohlander assert a "settled environment" defense.

Placing weight on the presence of all parties in the Swedish proceedings is inappropriate. The precipitating reason for all parties' participation in the Swedish action was Ms. Ohlander's unlawful flight from the United States with Julia. Had Ms. Ohlander obeyed the district court's order and remained in Utah with Julia during the pendency of the United States proceedings, all parties would have been physically present for the United States proceedings. Instead, Ms. Ohlander chose to participate through counsel rather than to personally attend the United States trial. Her unlawful absence from the United States trial should not accrue to her benefit.

The majority's view that the settled environment defense is available only in Sweden is similarly flawed. Article 12 of the Hague Convention creates the settled environment

place where the child is located at the time the

defense only when "a period of less than one year has elapsed from the date of the wrongful removal or retention." Hague Convention, art. 12, 51 Fed.Reg. at 10499. Because Mr. Larson filed in Sweden within one year of Ms. Ohlander's removal of Julia, the defense was unavailable to Ms. Ohlander in the Swedish action. Similarly, if Mr. Larson had complied with the majority's ruling and filed in the United States within one year of Julia's removal, the defense would have been unavailable in the United States action. Furthermore, the majority erroneously asserts that denying Ms. Ohlander's motion to dismiss renders the settled environment defense unavailable to her in the Utah action. The availability of the settled environment defense hinges on the filing and timing of Mr. Larson's own petition, not on whether Ms. Ohlander's motion to dismiss is granted or denied.

2. Hague Convention Procedures

The majority also states that Mr. Larson "chose to assert his claims in a court of another jurisdiction," Maj. Op. at 1539 (emphasis added), and that he would have been better served by filing a cross-petition in the United States District Court. Mr. Larson did not, however, have a choice where to file his petition once Ms. Ohlander took Julia to Sweden. Section 11603(b) of the International Child Abduction Remedies Act, the enabling legislation for the Hague Convention, provides:

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction *in the place where the child is located at the time the petition is filed.*

42 U.S.C. § 11603(b) (emphasis added). At the time Mr. Larson filed his petition in January 1995, Julia was in Sweden, not Utah. At that point in time, the enabling legislation

petition is filed." 42 U.S.C. § 11603(b).

for the Hague Convention itself compelled Mr. Larson to file in Sweden because of Julia's presence there; it was the only nation with jurisdiction.

Mr. Larson was careful to limit his Swedish petition to the issue of Ms. Ohlander's taking of Julia in February 1994. The petition specifically informed the Swedish court of the Hague Convention proceedings pending in the United States District Court for the District of Utah, and that Mr. Larson was not intending to confer jurisdiction on the Swedish courts over the Hague Convention matters that were properly before the United States District Court. Mr. Larson also requested that the Swedish courts await the district court's ruling on those matters.

After the United States District Court entered its findings and conclusions, the United States Central Authority notified Sweden of the United States ruling and asked that the Swedish court limit its decision to the issue presented in Mr. Larson's petition. In a memo to Sweden's Central Authority, a representative of the Office of Children's Issues stated:

The only unresolved Hague Convention issue for the Swedish courts to rule upon is the final resolution of Ms. Ohlander's most recent removal of the child from Utah on February 1, 1994. There is no doubt that Sweden is the "requested State" for the adjudication of that issue, and that the Swedish courts have exclusive jurisdiction to make a final resolution of that matter in accordance with the provisions of the Hague Convention. Regarding that removal, the U.S. Court, as a judicial authority of the "requesting State," has made findings in accordance with Article 15 of the Convention, namely that the removal was in breach of Mr. Larson's actually-exercised rights of custody under Utah law, and that Mr. Larson neither consent-

ed to nor acquiesced in the removal. These findings, coupled with the judicially established fact that the child was habitually resident in Utah in November 1993, where she continued to live until the date of said removal, clearly establish that this was a new wrongful removal within the meaning of Article 3 of the Convention.

Memorandum from Mr. James L. Schuler, Office of Children's Issues, United States Central Authority, to Central Authority of Sweden 2 (August 14, 1995).

The Hague Convention procedures thus not only required Mr. Larson to file in Sweden, where the child was located, but also allowed him to limit his petition to the one issue not before the United States District Court. By following Hague Convention procedures and limiting his Swedish petition, he did not voluntarily create the potential for conflicting international decisions.

3. *Conflicting Decisions*

The majority's desire to avoid conflicting decisions of sovereign states is a worthy goal. Nevertheless, no law, national or international, can be expected to resolve such conflicts in all cases, particularly cases involving a mother and father warring over their offspring. To base the outcome of this case on a *potentially* conflicting decision of Sweden is to unjustifiably abandon the rights of a United States citizen in the name of international comity. It is indeed ironic to do so when the substantive decision of the district court was not in conflict with any extant Swedish decision at the time of its promulgation. To the contrary, the Swedish decision favorable to Ms. Ohlander created the conflict in the decisions of two sovereign nations. The Swedish decision was issued after and in conflict with the district court decision.³ See *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 169-70 (3d Cir.1997) ("As a condition to honoring a foreign country's judicial decrees, the

3. Before the Sweden Supreme Administrative Court created the international conflict in decisions, the United States Central Authority entreated the Swedish courts:

It is only through [] cooperation that the Hague Convention can successfully resolve these international conflicts over children, as it was designed to do. The present case offers a perfect illustration: A Hague Convention judgment from Sweden which respects the prior

Hague Convention judgment from the U.S. will put an end to the international jurisdictional competition between these States and will allow for a final and long-overdue custody adjudication, thus providing for the best interests of the child and finally allowing her to develop stable, secure family relationships. On the other hand, a Hague Convention judgment from Sweden which disregards the prior Hague Convention judgment from the United

Court also requires reciprocity on the part of the foreign nation.”); *Remington Rand Corp.—Del. v. Business Sys. Inc.*, 830 F.2d 1260, 1273 (3d Cir.1987) (noting comity must be “two-way street” and reciprocity is consideration of “extreme importance”).

Because no Hague Convention decisions had been rendered by any Swedish courts at the time the district court ruled on the motion to dismiss, it is furthermore inappropriate for this court to base its ruling on the conflict in decisions. See Maj. Op. at 1541 (“By failing to dismiss the United States action we would allow to stand two conflicting decisions regarding Julia’s state of habitual residence. . . .”). Instead, our review should be limited to those factors before the district court at the time it ruled. New factual matters should only be considered by the district court in the exercise of its discretion on remand.

4. *Consideration of Ms. Ohlander’s Contempt*

The district court’s consideration of Ms. Ohlander’s contempt of court was entirely appropriate. Although the district court considered this to the exclusion of other relevant criteria, its actions in doing so are understandable, if not correct. Ms. Ohlander availed herself of the services of the district court to obtain temporary custody of the child. She then fled this country in direct

States would only perpetuate and escalate the already intolerable conflict, as the parties would then possess contradictory Hague Convention judgments in their favor from their respective States, which would be the most unstable and insecure situation imaginable. Such a situation would guarantee that whichever parent has possession of the child would not dare allow the other parent access to the child, and the parent without possession of the child would have no option but to resort to force in order to have any contact with the child.

Memo from Mr. James L. Schuler, Office of Children’s Issues, to Central Authority of Sweden 2–3 (August 14, 1995).

4. Rule 41(a)(2) provides: “If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff’s motion to dismiss, the action shall not be dismissed against the defendant’s objection unless the counterclaim can remain pending for independent adjudication by the court.” Fed.R.Civ.P. 41(a)(2).

violation of the very order by which she obtained physical control of the child. Her conduct can neither be ignored nor rewarded. Although this should not control the district court’s decision to the exclusion of other governing factors, it may fairly be given significant weight in the court’s overall analysis.

C. *Treatment of Larson’s Defenses as Counterclaims*

The majority rejects Mr. Larson’s request that his response to Ms. Ohlander’s petition be treated as a counterclaim or, for Hague Convention purposes, a petition.⁴ Maj. Op. at 1538–39. Rule 8(c) of the Federal Rules of Civil Procedure allows a court to treat a defense as a counterclaim, “if justice so requires.” In Mr. Larson’s response to Ms. Ohlander’s petition, he alleges that the United States was, and at all times had been, the country of Julia’s habitual residence as defined under the Hague Convention, and prays for his daughter’s return to his physical care and control. The essence of Mr. Larson’s response is generally equivalent to the relief he would request were he to file his own formal Hague Convention petition.⁵ Treating Mr. Larson’s response as a counterclaim would place the respondent’s removal of the child and any proper settled environment defense before the district court, thus eradicating the majority’s concern that such issues could not be decided without Mr. Lar-

5. For example, Ms. Ohlander’s petition before the district court requested the following relief:

Petitioner requests that the child be immediately returned to her custody, and that she be permitted to return to Sweden, which is the country of habitual residence of both Petitioner and the child, and that temporarily, pending further hearing on this Petition, she be permitted to retain custody of the child within the jurisdiction of this Court pending this Court’s final determination

Petition for Return of Child to Petitioner at 4; Mr. Larson alleged substantially the same matters in his defenses. Justice would not be served by requiring Mr. Larson to file a separate pleading, formally designated as a counterclaim, alleging the very matters already contained in his defenses. To do so honors form over substance in an emotionally charged setting where a parent seeks to reestablish contact with his child.

son's own petition in the district court. *See* Hague Convention, arts. 3 & 12, 51 Fed.Reg. at 10,498-10,499; 42 U.S.C. § 11603(b), (e). In light of Rule 41(a)(2) factors and the Hague Convention's objective of protecting children from the law of "grab and run," (Maj. Op. at 1534-35), the interests of justice are indeed served by construing Mr. Larson's response as a counterclaim.

D. Conclusion

The majority has reversed the district court for refusing to dismiss Ms. Ohlander's petition on the basis of her contempt of court and instead has ruled *de novo* that Ms. Ohlander's motion should have been granted. In doing so, the majority has considered facts not before the district court at the time it ruled. It has further allowed those very facts (*i.e.*, conflicting international decisions) to control the outcome of this appeal, to the exclusion of other governing criteria.

This case should be remanded to the district court for full consideration of Rule 41(a)(2) criteria.⁶ The trial court failed to consider critical factors governing Ms. Ohlander's motion. Consequently, the record of such factors is incomplete. An appellate court may decide a matter rather than remand if the underlying facts are undisputed and judicial economy and efficiency would be furthered thereby. *Park County Resource Council, Inc. v. United States Dept. of Agric.*, 817 F.2d 609, 617-18 (10th Cir.1987), *overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir.1992). Such is not the case here. A remand is required when the record needs further development. *See Mobley v. McCormick*, 40 F.3d 337, 341 (10th Cir.1994) (remanding when record inadequate to evaluate trial court's consideration of required criteria).

In this case, the record is simply insufficient to enable this court to apply adequately the legal criteria governing Rule 41(a)(2) motions to dismiss. In addition, the majority

has set forth a set of novel factors it believes must be evaluated in this case. The trial court had absolutely no notice that consideration of such factors would be required in this case. If the majority is going to require a trial court to consider novel factors, that court should be given an opportunity to exercise its discretion, address those factors on remand and develop a meaningful record. At that time, the district court could carefully consider the mandate of the Convention's Article 12 which provides that a forum may *stay* or *dismiss* a Hague Convention proceeding when the subject child has been taken to another State. Hague Convention, art. 12, 51 Fed.Reg. at 10,499.

In the context of this case, an appellate ruling as a matter of law is inappropriate. I would reverse and remand for further proceedings on Ms. Ohlander's Rule 41 motion to dismiss.



EASTMAN KODAK COMPANY, Eastman Chemical Company, and Zimmer Aktiengesellschaft, Plaintiffs/Cross-Appellants,

v.

The GOODYEAR TIRE & RUBBER COMPANY, Defendant-Appellant,
and

Shell Oil Company, Defendant-Appellant.

Nos. 95-1511, 95-1512, 95-1532 and 95-1533.

United States Court of Appeals,
Federal Circuit.

May 20, 1997.

As Modified on Limited Grant of
Rehearing July 2, 1997.

Owner of exclusive right to enforce patent for process for making granules of con-

matter of law assumes that the district court's discretionary ruling upon remand would be denial of the motion, rather than granting the motion or even staying the action, an alternative expressly contemplated by the Hague Convention. Hague Convention, art. 12, 51 Fed.Reg. at 10,499.

6. It is incongruous for this court to say that Rule 41 motions are addressed to the sound discretion of the trial court and yet, rather than remand, rule *de novo* that trial court discretion as a matter of law could only result in dismissal. Beyond this incongruity, ruling *de novo* that Ms. Ohlander's Rule 41 motion should be granted as a