

1998

Mark Andrew Larson v. Karin Sofia Ohlander : Petition for Writ of Certiorari

Utah Court of Appeals

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UTAH SUPREME COURT ✓

BRIEF

981429

IN THE SUPREME COURT OF THE STATE OF UTAH

MARK ANDREW LARSON,

Plaintiff/Appellee,

v.

KARIN SOFIA OHLANDER,

Defendant/Appellant.

PETITION FOR CERTIORARI

981429

Appeal Nos. 970375 CA
980054 CA

PETITION OF APPELLANT FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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FILED

Utah Court of Appeals

AUG 03 1998

Julia D'Alesandro
Clerk of the Court

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
QUESTION PRESENTED FOR REVIEW	4
CITATION TO OPINION OF THE COURT OF APPEALS	4
JURISDICTIONAL STATEMENT	4
STATEMENT OF THE CASE	4
The nature of the case:	4
The course of proceedings and disposition by other courts	4
Statement of Facts	6
SUMMARY OF ARGUMENT FOR CERTIORARI	13
DETAIL OF ARGUMENT	14
1. Contempt of Court Does Not Create Subject Matter Jurisdiction	14
2. This Court Must Determine If It (And The Trial Court) Had Subject Matter Jurisdiction	15
3. This Court Should Exercise Its Discretion To Hear This Case, Because of the Interests Of Third Parties, Including Sweden and Julia	17
CONCLUSION	18
CERTIFICATE OF MAILING	20
APPENDIX	21

TABLE OF AUTHORITIES

Cases:

<i>Crump v. Crump</i> , 821 P.2d 1172 (Utah App. 1991)	14
<i>D'Aston v. D'Aston</i> , 790 P.2d 590 (Utah Ct. App. 1990)	13, 16, 17
<i>Hammond v. Wall</i> , 171 P. 148 (Utah 1917)	15
<i>In Re Estate of Steinfeld</i> , 630 N.E.2d 801 (Ill. 1994)	15
<i>In Re Kramer</i> , 75 N.W.2d 753 (N.D. 1956)	15
<i>In Re Rogers' Estate</i> , 284 P. 992 (Utah 1930)	15
<i>Ohlander v. Larson</i> , 114 F.3d 1531 (10 th Cir. 1997)	8, 12
<i>State v. Barker</i> , 425 P.2d 753 (Or. 1967)	15
<i>State v. Thomas</i> , 550 So.2d 1067 (Ala. 1989)	15
<i>Thompson v. Jackson</i> , 743 P.2d 1230 (Utah Ct. App. 1987)	15, 16
<i>Transworld Systems, Inc. v. Robison</i> , 796 P.2d 407 (Utah Ct. App. 1990)	16
<i>Von Hake v. Thomas</i> , 881 P.2d 895 (Utah Ct. App. 1994)	13, 17
<i>Western Capital & Sec., Inc., v. Knudsen</i> , 768 P.2d 989 (Utah Ct. App. 1989)	16

Statutes:

42 U.S.C. §§ 11601-11610 (1994)	5, 8
U.C.A. §78-2-2, and 3(a)	4

Court Rules:

Utah R. Civ. P. 60(b)	5, 6, 12
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Other Authorities:

17 <i>Am. Jur.2d</i> §148, "Contempt", p. 504-505	15
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QUESTION PRESENTED FOR REVIEW

Whether an appellate court can create subject matter jurisdiction by holding a party in contempt?

CITATION TO OPINION OF THE COURT OF APPEALS

The Court of Appeals dismissed Petitioner Ohlander's appeals by way of an unpublished memorandum decision. See Exhibit A.

JURISDICTIONAL STATEMENT

The jurisdiction of the Utah Supreme Court is set forth as follows:

- a. The date of entry of decision to be reviewed is July 2, 1998.
- b. There are no petitions for rehearing or extensions of time.
- c. The Utah Supreme Court has statutory jurisdiction pursuant to *U.C.A.* §78-2-2, and 3(a).

STATEMENT OF THE CASE

- a. The nature of the case:

This petition is from a final order of the Utah Court of Appeals dismissing Ohlander's two appeals from a decree of divorce by the Fourth District Court of Utah, Hon. Anthony Schofield.

- b. The course of proceedings and disposition by other courts:

Ohlander (mother-resident of Sweden) and Larson (father-resident of Provo, Utah) are the divorced parents of a daughter, Julia, who is now nearly nine years old. Julia has resided with Ohlander in Sweden since 1992, save for a two month period in late 1993, and early 1994. The divorce proceedings between Ohlander and Larson began in 1991 in Sweden. Ohlander was granted custody by a Swedish domestic court, and Larson was granted rights of visitation. Larson was unhappy with the Swedish ruling, and in November, 1993, kidnapped Julia from Sweden under the

guise of exercising visitation. Ohlander came to Utah, and filed a petition in January, 1994, under authority of the International Convention for the Recovery of Abducted Children (the "Hague" convention), as implemented by 42 U.S.C. §§ 11601-11610 (1994). This case was assigned to Judge Bruce S. Jenkins, who entered an *ex parte* order that Larson return Julia to Ohlander. Judge Jenkins also ordered Ohlander not to leave Utah until a hearing could be held. Ohlander instead returned to Sweden with Julia on about February 1, 1994, and has not returned to Utah since.

Judge Jenkins eventually heard Ohlander's petition on the merits, and concluded that Utah was the "habitual residence" of Julia. Ohlander appealed, and the Tenth Circuit Court of Appeals reversed, in June, 1997, directing that Judge Jenkins' rulings be set aside, and the petition dismissed. *Ohlander v. Larson*, 114 F.3d 1531 (10th Cir. 1997), cert. den. (1997). While Ohlander's appeal was pending before the Tenth Circuit, Larson brought his own Hague petition before the Swedish courts. Larson's petition resulted in December, 1995, in a final, non-appealable ruling by the Swedish Supreme Administrative Court, that Julia was a "habitual resident" of Sweden, and that Sweden had jurisdiction over the custody dispute.

While Hague petitions were pending, in both Utah and Sweden, Larson filed the instant divorce action, in December, 1994, in the Fourth District Court in Utah. This divorce action was assigned to Judge Schofield. Judge Schofield held a divorce trial, pursuant to the rulings of Judge Jenkins, in October, 1996. A decree was entered on May 14, 1997, awarding custody of Julia to Larson. Ohlander made a timely appeal to the Utah Court of Appeals, and filed an appeal brief on October 9, 1997. This appeal was based (in large part) upon Ohlander's objection to Judge Schofield asserting subject matter jurisdiction over Julia's custody. After the Tenth Circuit vacated Judge Jenkins' findings and rulings, Ohlander made a motion under Utah R. Civ. P. 60(b) to set aside the

divorce decree. This motion was based upon a lack of subject matter jurisdiction over Julia's custody, in light of the subsequent disposition by the Tenth Circuit, and the Swedish Supreme Court. The Rule 60(b) motion was denied in January, 1998, and Ohlander perfected a timely appeal.

In January, 1998, Larson argued for the first time that Ohlander should be barred from appealing in the Utah state courts because she was in contempt of Judge Schofield's custody order. The Utah Court of Appeals agreed, and dismissed both Ohlander's appeals on July 2, 1998. This petition follows.

c. Statement of Facts:

Mr. Larson met Ms. Ohlander in Sweden while serving an L.D.S. mission, in 1986. (R. 45). Ms. Ohlander visited Mr. Larson in Utah, after his return from his mission, in 1989. (Id.). The two were married on October 27, 1989, in South Jordan, Utah. (Findings of Fact No. 1, R. 578). Mr. Larson is a United States citizen, while Ms. Ohlander is a citizen of Sweden. (Id.) They established their marital home in Utah County, Utah. (Id.). The parties had a child, Julia, born on August 13, 1990, in Provo, Utah. (Findings of Fact No. 4, R. 5). At the end of 1990, the parties went on vacation with Julia to Sweden to visit the family of Ms. Ohlander for Christmas. (Findings of Fact No. 11, R. 577). At the end of the visit, Ms. Ohlander decided to remain in Sweden with Julia, and went into hiding with Julia. (Id.) Mr. Larson eventually returned to the United States without either Ms. Ohlander or his daughter. (Id.)

Ms. Ohlander commenced a divorce and custody action in the Sandviken District Court in Sweden on January 30, 1991. (Findings of Fact No. 12, R. 576; R. 46). Mr. Larson was served with process from the Swedish court, but failed to respond. (R. 37). On May 10, 1991, the Sandviken District Court ordered temporary custody to Ms. Ohlander, by default. (Id.; R. 391) However, over

the next few months, Mr. Larson persuaded Ms. Ohlander to return to Utah. Ms. Ohlander arrived with Julia in Utah on June 3, 1991. (Findings of Fact No. 13, R. 576). The parties lived together with Julia in Utah until January 13, 1992, when Ms. Ohlander moved to Sweden with Julia, without Mr. Larson's consent. (Findings of Fact No. 14, R. 576).

Upon her return to Sweden, Ms. Ohlander continued the prior divorce and custody action which had been filed in Sweden in 1991. (Findings of Fact No. 15, R. 576). Mr. Larson, who is fluent in Swedish (Finding of Fact No. 26, R. 573), appeared in the action in Sandviken, with counsel provided by the Swedish Legal Aid Authority, and consented to a final divorce. (R. 40-46). He contested custody and visitation, but on November 13, 1992, the Sandviken District Court continued temporary custody in Ms. Ohlander, granting Mr. Larson "access" [visitation] for one month each year. (R. 43; R. 390). Mr. Larson appealed this ruling to the Court of Appeal for Southern Norrland, through his Swedish counsel. (R. 35-38). On January 12, 1993, the Court of Appeal ordered that Mr. Larson's visitation be limited to four weeks, spaced throughout the year, in Sweden only, and under Ms. Ohlander's supervision. (R. 35; R. 390).

Mr. Larson exercised this visitation, under the terms of the Court of Appeal ruling, in May, 1993. (Finding of Fact No. 20, R. 575; R. 390). The visitation in Sweden occurred during specified daytime hours on seven consecutive days, under Ms. Ohlander's personal supervision. (Id., R. 574). Sometime after this May, 1993, supervised visitation, Mr. Larson decided that the Swedish courts lacked jurisdiction to decide custody of Julia. (Finding of Fact No. 21, R. 574). As a consequence, he filed an action for divorce in Utah County in June, 1993. (Id.). Despite the fact that he had just been in Sweden visiting Julia in the home of Ms. Ohlander, Mr. Larson obtained an order for service by publication upon Ms. Ohlander on the basis that he did not know her whereabouts. (R. 54).

Default was entered against Ms. Ohlander, and a Decree of Divorce entered on October 21, 1993. (Id.).

On November, 1993, Mr. Larson, now remarried, went to Sweden to visit Julia. (Findings of Fact No. 24, R. 573). This visitation was again under the supervision of Ms. Ohlander, during specified daytime hours, and mostly in her apartment. (Id.). Mr. Larson, however, was able to trick Ms. Ohlander, and to flee Sweden with Julia. (Id.; R. 390). Julia then lived in Utah County for the next two months with Mr. Larson. (Finding of Fact No. 25, R. 573).

On January 26, 1994, Ms. Ohlander filed a petition pursuant to the Hague Convention in the federal district court of Utah. (Finding of Fact No. 29, R. 572).¹ This petition sought the return of Julia to Sweden pursuant to 42 U.S.C. §§ 11601-11610 (1994). Judge Bruce S. Jenkins issued an *ex parte* order directing any peace officer in Utah to deliver custody of Julia to Ms. Ohlander, pending a hearing. (Id., R. 571-2). This order from Judge Jenkins included a direction not to remove Julia from Utah. In compliance with that order, Mr. Larson delivered Julia to Ms. Ohlander on January 30, 1994. (Finding of Fact No. 30, R. 571). However, on February 1, 1994, Ms. Ohlander returned to Sweden with Julia. (Finding of Fact No. 31, R. 571).

Once back in Sweden, Ms. Ohlander refused to appear again before Judge Jenkins, and as a result, was found in contempt on August 15, 1994. (Finding of Fact No. 32, R. 570-571). In October, 1994, Mr. Larson filed an application with the Swedish Central Authority for the return of Julia. (R. 645). Additionally, on December 19, 1994, Mr. Larson filed the instant divorce proceeding in Utah County, seeking a divorce and custody of Julia. (R. 1-3). Ms. Ohlander appeared specially,

¹See *Ohlander v. Larson*, 113 F.3d 1573 (10th Cir. 1997) for detailed discussion of the nature and purposes of a petition under the Hague convention relating to child custody disputes.

contesting the jurisdiction of the Utah County court to decide custody. (R. 14-17). On February 6, 1995, the previous Decree of Divorce obtained by Mr. Larson by default was set aside and the action dismissed. (R. 56).

In response to Mr. Larson's Hague application in Sweden, Ms. Ohlander moved to dismiss her own petition before Judge Jenkins. (R. 645). Additionally, on January 27, 1995, Mr. Larson filed his own Hague petition in the Swedish courts, "for the return of Julia to the U.S.A." (R. 370). Judge Jenkins denied Ms. Ohlander's motion to dismiss solely on the basis of her contempt. (R. 644). Judge Jenkins then conducted a bench trial on the Hague issue of "habitual residency". (Id.). On June 12, 1995, he entered a judgment declaring that Julia's "habitual residency" had always been in Utah. (R. 248, 253). He further directed the Utah County state district court to assume and determine custody of Julia. (R. 248, 252). Ms. Ohlander appealed to the Tenth Circuit from that ruling by Judge Jenkins, and sought a stay of enforcement, which he denied. (Finding of Fact 45, R. 565).

On the other side of the Atlantic, on July 5, 1995, the Gavleborg County Administrative Court denied Mr. Larson's Hague petition. (Finding of Fact No. 43, R. 565-566; R. 231). Mr. Larson appealed to the Sundsvall Administrative Court of Appeal, which ruled in Mr. Larson's favor on August 25, 1995. (Finding of Fact No. 43, R. 565; R. 224-231). This court of appeal ordered the return of Julia to Mr. Larson by August 31, 1995. (Id.) However, Ms. Ohlander went into hiding, pending her appeal to the Swedish Supreme Administrative Court. (Finding of Fact No. 44, R. 565). During the Hague proceedings in Sweden, Julia was in great fear of being removed from her mother, relatives and school, and packed off to Utah. (Finding of Fact No. 44, R. 565; R. 408). This was largely due to the sudden abduction Mr. Larson perpetrated the prior November. (Id.) Published

accounts, which included interviews with Ms. Ohlander and Julia, graphically set forth the climate of fear created by Mr. Larson's prior abduction. (R. 410-418; cf. Finding of Fact No. 42, R. 566). Ms. Ohlander's appeal to the Swedish Supreme Administrative Court was granted, and that court ruled that Julia's habitual residency, at the time of her removal to the U.S.A. in November, 1993, was in Sweden. (R. 363-372; Finding of Fact No. 48, R. 564). This ruling was issued on December 20, 1995. (Id).

Meanwhile, pursuant to Judge Jenkins's ruling on habitual residency, Ms. Ohlander's counsel withdrew his special appearance (R. 150), and answered the complaint for divorce and custody. (R. 181-184). This answer contained the affirmative defense that the Utah County court lacked subject matter jurisdiction over the custody request. (R. 183). On September 22, 1995, Mr. Larson sought a temporary custody order from the court in the present case. (R. 270-271).² Mr. Larson submitted an affidavit in support of his order to show cause alleging that Ms. Ohlander refused contact with him. (R. 266-269). This affidavit covered his attempts to see Julia while he was in Sweden in 1995 during the Swedish Hague proceedings. (Id.) Apparently, Mr. Larson failed to seek any visitation relief from the Swedish district court in Sandviken. (Id.) Ms. Ohlander averred that she had never denied Mr. Larson his court-ordered visitation in Sweden. (R. 390). She further averred that she had been the primary physical caretaker of Julia since her birth. (R. 388-390). At that time, Julia was well-adjusted in her environment, and has a close relationship with her grandmother and other relatives. (R. 388). Julia attended kindergarten while Ms. Ohlander attended the university in the morning. (R. 389). In the afternoon, Ms. Ohlander personally provided care for Julia. (Id.) Julia speaks only Swedish. (Id.) Despite having been ordered to do so by the Swedish district court in

²Ms. Ohlander's present counsel appeared on October 12, 1995.

Sandviken, Mr. Larson has never supported Julia financially at all. (R. 388).

In spite of the supportive and successful environment in Sweden for Julia, on February 1, 1996, Judge Schofield issued a ruling changing temporary custody of Julia to Mr. Larson. (Finding of Fact No. 49, R. 563; R. 434-438). This assertion of child custody jurisdiction by Judge Schofield was based exclusively on Judge Jenkins' order. (R. 437). There was no analysis to support jurisdiction under the U.C.C.J.A. (Id.). Judge Schofield based his ruling changing custody to Mr. Larson in large part on Mr. Larson's affidavit claim that he was denied visitation, which was not ordered by the Swedish court. Of course, this ruling was despite the affidavit of Ms. Ohlander that she provided all court-ordered visitation. Ms. Ohlander did not comply with the change of custody order from Judge Schofield and was held in contempt. (R. 442).

Mr. Larson sought further punishment of Ms. Ohlander, for her refusal to turn Julia over to him. (R. 460-461). This matter was heard on May 23, 1996. Ms. Ohlander's counsel, in response, made an oral motion for appointment of a guardian ad litem. (R. 462). Judge Schofield took the oral motion under advisement, and continued the hearing until June 11, 1996. Ms. Ohlander's counsel thereafter made a written request for a guardian ad litem. (R. 463-470). Judge Schofield granted appointment of a guardian ad litem, and ordered Ms. Ohlander's counsel to recommend local counsel to act in that capacity. (Finding of Fact No. 52, R. 562; R. 480). Pursuant to a request from Ms. Ohlander's counsel, attorney Lori Fowlke agreed to act as guardian ad litem, and she was appointed to act as such. (R. 482-483). At the hearing on June 11, 1996, Mr. Larson asked for telephone visitation. (R. 479). Judge Schofield ordered that Ms. Ohlander telephone Mr. Larson each Thursday at 10:00 a.m. M.S.T. (R. 481). Pursuant to that order, Ms. Ohlander telephoned Mr. Larson for Julia at least 13 of the 19 scheduled times before trial. (Finding of Fact No. 50, R. 553).

Ms. Ohlander's counsel arranged to have the guardian ad litem's cost funded by the Swedish government. (R. 496). The guardian traveled to Sweden, and personally visited Ms. Ohlander, Julia, and other persons in Sweden with knowledge of Julia's circumstances. (Finding of Fact No. 52, R. 562). She prepared a detailed report to the court, submitted and received by Judge Schofield at trial. (Defendant's Ex. 10.; R. 551).

Trial was held on October 18, 1996, over Ms. Ohlander's objection, and request to wait until after the Tenth Circuit ruled on her appeal from Judge Jenkins' order. (R. 510-518). Ms. Ohlander failed to appear at trial in person; however, she was represented by her counsel. (R. 552). The guardian ad litem, Mr. Larson and his current wife were the only witnesses. (Id.). Judge Schofield, predictably, found that the evidence favored Mr. Larson's claim for custody. (R. 550). On May 14, 1997, Judge Schofield entered "canned" Findings of Fact and Conclusions of Law prepared entirely by Mr. Larson's counsel (R. 553-579, and a Decree of Divorce (R. 580-585). This appeal followed on June 13, 1997.

Subsequent to the decree entered by Judge Schofield, the Tenth Circuit vacated Judge Jenkins' findings and rulings, and ordered that Ms. Ohlander's Hague petition in Utah be dismissed without prejudice. *Ohlander v. Larson*, 114 F.3d 1531 (10th Cir. 1997), cert. den. (1997). As a result of the Tenth Circuit's ruling, Ms. Ohlander filed a motion pursuant to Utah R. Civ P. 60(b), to set aside the final judgment in this case. (R. 592-595). This motion was denied by order of December 17, 1997, followed by a timely appeal by Ohlander. Upon motion of Larson, the Utah Court of Appeals conditionally dismissed the appeal from the original custody ruling, and the denial of Rule 60(b) relief on July 2, 1998. When Ohlander declined to reinstate her appeal by compliance with the decree, the appeals were unconditionally dismissed, Exhibit A hereto.

SUMMARY OF ARGUMENT FOR CERTIORARI

Certiorari is appropriate for the following reasons:

The Court should direct the Court of Appeals to hear and decide the question of subject matter jurisdiction over this international custody dispute. Even though Ohlander refused to obey Judge Schofield's custody ruling, if there was no subject matter jurisdiction, there is no contempt. The Court of Appeals dodged prior rulings of this Court, and of its own panels, in dismissing Ohlander's appeals without deciding the question of its jurisdiction.

Unless review is granted, and the jurisdictional standoff resolved, Utah will stand at odds with the rulings of the United States federal courts, and the courts of Sweden. The Tenth Circuit was very concerned about avoiding conflicting rulings from Sweden and Utah. Apparently, the Utah Court of Appeals was not very worried about the interests of federalism or international comity.

A child's future is caught in a jurisdictional "Gordian Knot", as the Tenth Circuit put it, and this Court is the last court that can untie that knot. While the interests of the parties, and States, and countries are at issue, the court should recognize that ultimately it is the interest of Julia, a child not before the court, that is at stake. It is ironic that the Tenth Circuit panel all agreed that it was an abuse of discretion to decide this case based solely on Ohlander's contempt. The irony is only heightened when one considers that Larson has appeared and appealed freely in the Swedish courts, despite his non-compliance with their orders.

The court should consider the limits that may appropriately be imposed, in cases where a child's custody is in dispute, upon the doctrines of *Von Hake v. Thomas*, 881 P.2d 895 (Utah Ct. App. 1994) and *D'Aston v. D'Aston*, 790 P.2d 590 (Utah Ct. App. 1990), which bar a contemptuous party's appeal. This is an issue that merits consideration for the guidance of trial courts, appellate

courts, and practitioners in the domestic area. Given the ever-increasing mobility of our society, these situations are bound to recur, and cause unnecessary cavil in the lower courts unless they are sorted out by this Court.

The specific relief requested is two-fold: for this Court to directly hear and determine subject matter jurisdiction or to direct the Utah Court of Appeals to hear and decide the appeal as to subject matter jurisdiction.

DETAIL OF ARGUMENT

1. Contempt of Court Does Not Create Subject Matter Jurisdiction

A defect in subject matter jurisdiction can be raised at any time, even after being held in contempt:

...while defects in personal jurisdiction can be waived, subject matter jurisdiction goes to the very power of a court to entertain an action. A lack of subject matter jurisdiction cannot be stipulated around nor cured by a waiver. **A lack of subject matter jurisdiction can be raised at any time and when subject matter jurisdiction does not exist, neither the parties nor the court can do anything to fill the void.**

Crump v. Crump, 821 P.2d 1172, 1173-74 (Utah App. 1991) (quoting *Curtis v. Curtis*, 789 P.2d 717, 726 (Utah App. 1990) (citations omitted))(emphasis added). Nothing can be done by the parties to fill the subject matter jurisdiction void, not even by contumaciously ignoring the proceedings. Otherwise, a trial or appellate court could create subject matter jurisdiction through the contempt process, in direct violation of the holding of *Crump*.

When a court lacks subject matter jurisdiction, its proceedings are null and void: “[s]ince the entire proceedings before the circuit court were conducted absent jurisdiction, they are a nullity and

are void. [citations omitted]". *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah Ct. App. 1987). Once the lack of subject matter jurisdiction was pointed out, the trial court had no alternative but to dismiss. It could not proceed further, to require Ms. Ohlander to deliver custody to Mr. Larson, or to hold her in contempt. "Upon a determination by the Court that its jurisdiction is lacking, its authority extends no further than to dismiss the action. [citation omitted]. . . . It was improper for the court to proceed in this matter other than by dismissal." *Thompson v. Jackson*, at 1232. An order of contempt issued by a court without subject matter jurisdiction is void, and subject to attack on appeal. *Hammond v. Wall*, 171 P. 148 (Utah 1917)(an order exceeding a court's jurisdiction is void, and no contempt is committed by disobeying it); *In Re Rogers' Estate*, 284 P. 992, 997 (Utah 1930)("A failure to comply with a void judgment is not contempt"). See also *17 Am. Jur.2d* §148, "Contempt", p. 504-505, "A court cannot punish as contempt a violation of an order beyond the court's power or jurisdiction".

Other courts have held that a court which lacks subject matter jurisdiction cannot hold a party in contempt. See *State v. Thomas*, 550 So.2d 1067, 1070 (Ala. 1989)("in order to hold a person in contempt, a court must have jurisdiction of the person and of the subject matter"); *State v. Barker*, 425 P.2d 753 (Or. 1967)(order of contempt for failing to deliver custody of child void because issuing court lacked jurisdiction over the suit); *In Re Estate of Steinfeld*, 630 N.E.2d 801 (Ill. 1994)(unless order is void, court with subject matter jurisdiction may enforce orders by contempt); *In Re Kramer*, 75 N.W.2d 753 (N.D. 1956)(lack of subject matter jurisdiction may be raised by party held in contempt).

2. This Court Must Determine If It (And The Trial Court) Had Subject Matter Jurisdiction.

The trial court had an independent obligation to determine whether it had subject matter

jurisdiction. This court has a similar obligation:

Subject matter jurisdiction is the power and authority of the court to determine a controversy and without which it cannot proceed. Without jurisdiction over the subject matter alleged in plaintiff's claims, the court was without authority to proceed or to enter any adjudication on the merits of the claims. . . . The fundamental and initial inquiry of a court is always to determine its own jurisdictional authority over the subject matter of the claims asserted. The trial court should have examined its own jurisdictional limitations at the time plaintiff sought the initial default judgment and dismissed the action. . . . Even in the absence of a proper objection, the issue should have been raised on the court's own motion. Upon its failure to raise the issue, **we are obligated to do so.** [citations omitted].

Thompson v. Jackson, at 1232. An appellate court "may decide a question of subject matter jurisdiction where it appears on the face of the record." *Western Capital & Sec., Inc. v. Knudsen*, 768 P.2d 989, 992 (Utah Ct. App. 1989), quoting *Carreathers v. Carreathers*, 654 P.2d 871 (Colo. Ct. App. 1982). Accord, *Transworld Systems, Inc. v. Robison*, 796 P.2d 407 (Utah Ct. App. 1990).

The *D'Aston v. D'Aston* opinion, 790 P.2d 590 (Utah Ct. App. 1990), and the cases that followed it, all rest upon the assumption that the trial court had jurisdiction, to which the appellant could be forced to submit. In none of those cases was the personal jurisdiction of the trial court questioned, let alone the subject matter jurisdiction of the trial court to even enter the orders subsequently disobeyed. For instance, the *D'Aston* court held that "[appellant] must **submit herself to the jurisdiction of the trial court** and satisfy that court's concerns before she may exercise that right [to appeal]." *Id.* at 594. Here, the trial court had no subject matter jurisdiction to which Ms. Ohlander needed to submit. To force the appellant in this case to submit to the jurisdiction of the trial court would assume the ultimate result on the merits, i.e., subject matter jurisdiction, under the guise of enforcing a contempt order. This is logically absurd.

The appeal brief of Ms. Ohlander points out in more detail why the trial court lacked subject

matter jurisdiction. That argument is incorporated herein. Nowhere in the memorandum decision of the Court of Appeals is there a finding of subject matter jurisdiction. This Court should order the Court of Appeals and the trial court to specifically rule on that issue, after allowing Ohlander to brief and argue that jurisdictional issue.

3. This Court Should Exercise Its Discretion To Hear This Case, Because of the Interests Of Third Parties, Including Sweden and Julia

The Court of Appeals assumed that *D'Aston* and *Von Hake* applied in this case, and that dismissing the appeal was necessary. *D'Aston* and *Von Hake* actually do not mandate a dismissal of an appeal in every case:

D'Aston [I] affirms the court's discretionary authority to dismiss the appeals of contumacious litigants under terms which are fair and just given the circumstances of a particular case. **Under *D'Aston* [I], a court has the discretion to determine what is a reasonable approach in dealing with a contumacious litigant** who, even while disregarding the judiciary's contempt process, nonetheless wishes to avail himself or herself of judicial procedures thought to be beneficial.

Von Hake v. Thomas, 881 P.2d 895, 898 (Utah Ct. App. 1994). This court should exercise that discretion to defer consideration of contempt until it has determined whether the trial court had subject matter jurisdiction in the first place to issue orders requiring Ms. Ohlander to deliver custody to Mr. Larson. There are several reasons for this approach.

Most importantly, this court has an obligation to consider the effect of the opinion of the Tenth Circuit Court of Appeals. The exercise of child custody jurisdiction in this case was based solely upon Judge Jenkins' finding of habitual residency. The Tenth Circuit set that finding aside. There was no other basis for child custody jurisdiction. Judge Schofield elevated Judge Jenkins over the Tenth Circuit when he refused to consider the effect of the Tenth Circuit's decision on his exercise of child custody jurisdiction. However, the Tenth Circuit was well aware of Ms. Ohlander's

contempt when it issued its opinion. Consideration of the Tenth Circuit's opinion leaves the clear message that it intended only one proceeding to determine child custody, and that that proceeding would be in Sweden. To suggest that the Tenth Circuit expected its opinion to be set at naught by the divorce court, invites an accusation of contempt of the federal courts.

In a related vein, the Swedish Supreme Court has already ruled that it has jurisdiction. This is a final, non-appealable ruling, binding on both parties. This court should carefully consider whether it has subject matter jurisdiction before setting itself at odds with the legal system of another country.

Second, it avoids the logical absurdity of assuming the ultimate result, jurisdiction, under the guise of preserving the authority of the court. Third, it avoids determining custody by default. The long-settled environment of Julia, the child of the parties, should not be disrupted because her mother refuses to concede jurisdiction in a foreign country, in order to oppose that jurisdiction. Fourth, the court should not reward Mr. Larson's contempt of the Swedish courts by refusing to allow Ms. Ohlander to oppose subject matter jurisdiction in the United States.

Finally, dismissing the appeal without considering the merits would consign Julia and the parties to a jurisdictional purgatory, where the question of Utah's jurisdiction is perpetually held in limbo. This would not be in anyone's best interests, including Mr. Larson's. Because of the unique circumstances in this case, dismissal of the appeal would be the wrong solution. Instead, the appeal should be heard on its merits. If Judge Schofield is ultimately found to have jurisdiction to have entered his contempt orders, there will be time enough at that point to consider sanctions.

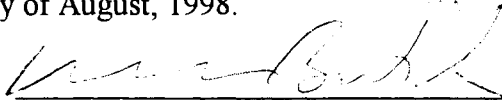
CONCLUSION

The sum and substance of this case is that Utah lacked subject matter jurisdiction to hear the child custody case. For that reason, Judge Schofield lacked jurisdiction to proceed, by ordering Ms.

Ohlander to deliver Julia to Mr. Larson, and lacked jurisdiction to hold her in contempt for failing to do so. This defect in the proceedings is so fundamental that even contempt of court cannot salvage the situation. Further, the interests of another sovereign nation, and a little child are also at stake. To muzzle the mother for simply honoring the legal process of her own country would be unjust to her, her country and to Julia.

The Court of Appeals dodged the issue of subject matter jurisdiction entirely, basing its order of dismissal solely on Ohlander's contempt and refusal to purge that contempt. This avoids the prior doctrine of this Court, and of the Court of Appeals as well. A writ of certiorari should issue to determine whether Utah courts have jurisdiction over this child custody dispute.

DATED this 3 day of August, 1998.



Daniel F. Bertch
Kevin K. Robson
Attorneys for Ohlander

CERTIFICATE OF MAILING

I hereby certify that on the 3 day of August, 1998, I served a true and correct copy of the foregoing APPELLANT'S PETITION FOR CERTIORARI, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

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

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



APPENDIX

Memorandum Decision of the Court of Appeals	A
Order of Sandviken District Court (11/2/92)	B
Order of Court of Appeal for South Norrland (12/18/92)	C
Swedish Supreme Administrative Court Judgment (12/20/95)	D
Fourth District Court Decree of Divorce (5/14/97)	E
<i>Ohlander v. Larson</i> , 114 F.3d 1531 (10 th Cir. 1997)	F

Tab A

FILED

JUL 02 1998

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

-----ooOoo-----

Mark Andrew Larson,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 970375-CA
v.)	Case No. 980054-CA
)	
Karin Sofia Ohlander,)	
)	F I L E D
Defendant and Appellant.)	(July 2, 1998)

Fourth District, Provo Department
The Honorable Anthony W. Schofield

Attorneys: Daniel F. Bertch and Kevin K. Robson, Salt Lake City,
for Appellant
Brian C. Harrison, Provo, for Appellee

Before Judges Bench, Billings, and Greenwood.

PER CURIAM:

Appellant Karin Sofia Ohlander appeals from a divorce decree in Case No. 970375-CA (the "first appeal") and from an order denying a motion to set aside the divorce decree in Case No. 980054-CA (the "second appeal").

Appellee Mark Andrew Larson sought dismissal of the first appeal pursuant to D'Aston v. D'Aston, 790 P.2d 590 (Utah Ct. App. 1990) based upon Ohlander's contempt through failure to comply with the district court's orders and decree. This court granted Larson's motion to dismiss, subject to Ohlander's satisfaction of specified conditions that would allow the first appeal to continue. Larson now seeks dismissal of the second appeal on the same basis.

This court has consistently held that an appellate court possesses "discretionary authority to dismiss the appeals of contumacious litigants under terms which are fair and just given the circumstances of a particular case." Von Hake v. Thomas, 881 P.2d 895, 898 (Utah Ct. App. 1994). In its order of April 14, 1998, this court conditionally granted the motion to dismiss the first appeal. The court required that, in order to continue her appeal, "appellant Karin Sofia Ohlander shall comply with the

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of July, 1998, a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to:

Daniel F. Bertch
Kevin K. Robson
Bertch & Birch
5296 S 300 W #100
Salt Lake City UT 84107

Brian C. Harrison
Hill, Harrison, Johnson & Schmutz
3319 N University #200
Provo UT 84604

Courtesy copy to:
Lorie D. Fowlke
Guardian ad Litem
Jeffs & Jeffs
90 N 100 E
Provo UT 84601

and a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to the judge listed below:

Honorable Anthony W. Schofield
Fourth District Court
125 N 100 W
PO Box 1847
Provo UT 84601


Judicial Secretary

TRIAL COURT: Fourth District, Provo Dept., #944402943
APPEALS CASE NO.: 970375-CA & 980054-CA

Tab B

SANDVIKEN DISTRICT COURT

MINUTES OF PRELIMINARY
HEARING

in Sandviken on
2nd November 1992

T 33/91

Annex: 30

THE COURT

Deputy District Judge Johan Alvsner

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, of 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 in 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



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 instances, 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 Harnel 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 standing 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 Hennef 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.

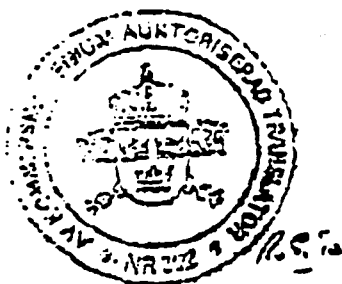
Retiring to chambers, the District Court made a part-judgement and the following

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. 900813-3979, 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

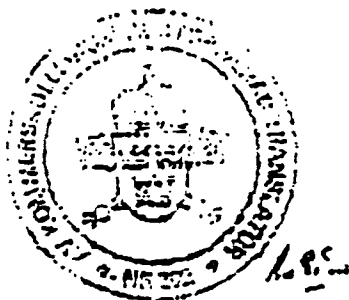
Record read and approved/ (Initials)

(Stamp:)

SANDVIKEN DISTRICT COURT

For a true copy,

(Signature)



Tab C

**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 Branneberg, Acting Appellate Court Judge

KEEPER OF THE MINUTES

The Referee

VARIOUSLY APPELLANT AND OPPONENT (not present)

Karin SOFIA Larson, nat. reg. no. 671029-7505, Plangatan 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. 6.11.55, 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

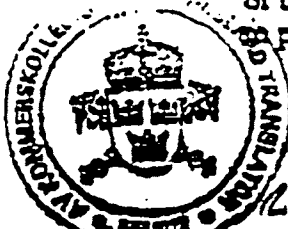
Temporary order concerning right of access to child etc.

DECISION CONTESTED

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

The case being presented by Trainee 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



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 1,730 and Bengt Hennel SEK 2,570 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 D

SUPREME ADMINISTRATIVE COURT

JUDGMENT

Case no.

4936-1995

delivered in Stockholm on December 20, 1995

COMPLAINANT

Sofia Öhländer, personal identification no. 671029-7505, of Plangatan 6 C, 811 39 Sandviken

Representative and counsel under the Legal Aid Act:
Anita Wallin Wiberg, Attorney-at-law, Advokatfirman
Hahne & 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 Jarlsgatan
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

DEMANDS ETC.

Sofia Öhlander 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 Öhlander 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 Öhlander'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 Öhlander should have custody of her. Julia was residing in the USA in January/February, 1994 when Sofia Öhlander unlawfully abducted her. Subsequently, Sofia Öhlander 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

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 1973:158, 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 16 218 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.

/signature/
Stig Brink

/signature/
Elisabeth Palm

/signature/
Sigvard Berglöf

/signature/
Anders Swartling

/signature/
Arne Bækkevold

/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

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

fully advised in the premises, and having entered its Findings of Fact and Conclusions of Law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

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

2. Plaintiff is hereby granted 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 affords 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 is awarded alimony.

6. The present distribution of personal property and debts is hereby confirmed.

7. Permanent sole custody of the parties' minor child, Julia Sofia Larson, is hereby 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 are ordered to actively help Julia acquire and maintain the ability to communicate fluently in both English and Swedish.

10. Sofia is ordered to immediately return Julia to Utah and turn her over to Mark. To assist in making the transition easier for Julia, Sofia is granted 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, are ordered to 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 is ordered to 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 W. Schofield
JUDGE ANTHONY W. SCHOFIELD
DISTRICT COURT JUDGE

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 *the Indian Tribe III*, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 1, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). Further, we MODIFY our mandate in *Ute Indian Tribe III* as set out above and REVERSE with instruction that the district court consider the Tribe's request for permanent injunctive relief in light of this opinion.



in 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, father, a Swedish citizen, filed Hague Convention petition seeking child's return to Sweden. Mother subsequently took child to United States to Sweden, in violation of court order, and was found in contempt. Father then filed Hague Convention petition in United States for return of child to United States. Mother filed motion to voluntarily dismiss district court petition. The United

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

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

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.

5. 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.

6. 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.

7. 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 mother'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.

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 1993,¹⁷ 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 of 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. 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 4999. 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).

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

court. Fed.R.Civ.P. 41(a)(2). We review 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. Andes Corp.*, 788 F.2d 1033, 1036 (4th Cir.1985) (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

"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 demand for lack of diligence on the part of the plaintiff; insufficient explanation of the need for dismissal; and the present stage of the litigation. *Phillips U.S.A., Inc. v. Allflex L, Inc.*, 77 F.3d 354, 358 (10th Cir.1996). No single 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 exhaustive. *Id.* at 358. Any other relevant factors should come into the district court's consideration. In fact, in the context of this Hague Convention proceeding, the district court was impressed with a duty to exercise 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.

The district court should endeavor to ensure substantial justice is accorded to the 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 to the defendant, but also those facing the plaintiff; a court's refusal to do so is a failure 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 Industries, 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.

ah, the Convention's art. 12 allowed for a y 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 Convention's art. 12 dismissal provision. Certainly, the first two reasons alone are sufficient to support a motion to dismiss. It 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 will prejudice Mr. Larson. Rather, as Ohlander emphasizes, by initiating a second 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.

ii) 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 filing mistakenly designated as a defense as a counterclaim when justice requires. 28 Fed. Cl. 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 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. To the contrary, we are only holding Mr. Larson accountable for his actions. Even though Julia is 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. § 103(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 either dismiss an action versus mandating a

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.

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.

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

b. *Intent of the Hague Convention*

ailing to grant the motion to dismiss re a second duplicative action has been l in a different country would potentially der the Hague Convention meaningless. of the Convention's intent is "to ensure rights of custody and of access under aw of one Contracting State are effecty respected in other Contracting States." ue Convention, art. 1(b), 51 Fed.Reg. at 8. Prior to the Convention, when faced an unfavorable custody decision, a par- would flee to another country in search of stody decision in his or her favor. This d often result in two conflicting custody sions without guidance as to which coun- custody decision had preference. The ie Convention was drafted with the in- to remove forever the incentive for a nt to flee across borders to obtain a able ruling. Letter of Transmittal from dent Ronald Reagan (Oct. 30, 1985), nted in 51 Fed.Reg. 10494, 10,495); Pub. Notice 957, 51 Fed.Reg. 10494, 5 (1986). Under the Convention, a child be expediently returned to his or her of habitual residence "so that a court can examine the merits of the custody te and award custody in the child's best sts." Pub. Notice 957, 51 Fed.Reg. at . As a result, the Convention was t, in part, to lend priority to the custody mination hailing from the child's state itual residence.

ile the Convention proceedings in this ertainly have not achieved this intend- ult, a refusal to dismiss this action only rbates the problem. By failing to dis- he United States action we would allow nd two conflicting decisions regarding

s dissent opines our reliance on this factor is e because the conflict between the two deci- was merely "potential" at the time Mr. on filed the duplicative action in Sweden. It

Julia's state of habitual residence, which could very well require a Hague Convention to determine which Hague Convention deter- mination 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 pur- pose.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 coun- try. 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 re- sources best spent if parents engaged in this type international custody battle are re- quired to resolve their dispute in one juris- diction or the other. Holding Mr. Larson and future litigants to one jurisdiction gives import to the Convention's intended mean- ing.

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 impris- onment. *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 avail- able 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 dif- ferent countries' custody decisions that made the Convention necessary.

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 on 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 for 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.

t 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.

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

Before the Sweden Supreme Administrative Court created the international conflict in decisions, the United States Central Authority en-
teated 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).

1. 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.

n's own petition in the district court. See Hague Convention, arts. 3 & 12, 51 Fed.Reg. 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," *id.* Op. at 1534-35), the interests of justice are indeed served by construing Mr. Larsson's response as a counterclaim.

2. Conclusion

The majority has reversed the district court for refusing to dismiss Ms. Ohlander's petition on the basis of her contempt of court. Instead has ruled *de novo* that Ms. Ohlander's motion should have been granted. In doing so, the majority has considered issues not before the district court at the time ruled. It has further allowed those very issues (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 the factors is incomplete. An appellate court may decide a matter rather than re-litigate the underlying facts are undisputed. Judicial economy and efficiency would be served thereby. *Park County Resource Management, Inc. v. United States Dept. of Agric.*, 922 F.2d 609, 617-18 (10th Cir.1997), *overruled on other grounds by Village of Los Alamos v. Albuquerque v. Marsh*, 956 F.2d 73 (10th Cir.1992). Such is not the case here. A remand is required when the record needs further development. See *McCormick v. McCormick*, 40 F.3d 337, 341 (10th Cir.1994) (remanding when record inadequate to evaluate trial court's consideration of criteria).

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

is incongruous for this court to say that Rule 41(a)(2) motions are addressed to the sound discretion of the trial court and yet, rather than remand, to rule *de novo* that trial court discretion as a matter of law could only result in dismissal. Beyond that, congruity, ruling *de novo* that Ms. Ohlander's Rule 41 motion should be granted as a

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.

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-

crete. 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.