Opinion issued December 20, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00093-CV

MARCELLE GUIMARAES, Appellant

V.

CHRISTOPHER SCOTT BRANN, Appellee

On Appeal from the 308th District Court
Harris County, Texas
Trial Court Case No. 2012-53837

OPINION DISSENTING FROM DENIAL OF EN BANC RECONSIDERATION

This is a case brought under the Hague Convention on the Civil Aspects of International Child Abduction[1] (the Hague Convention). It involves an international

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[1] *See* Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,494 (Mar. 26, 1986) (hereinafter "Hague Convention").

child abduction by the child's mother, Marcelle Guimaraes, from Texas to Brazil in violation of temporary orders granting the father, Christopher Brann, visitation rights that was issued by the 308th Harris County District Court in the parents' pending divorce case. The panel opinion of this Court peremptorily declares subject-matter jurisdiction to be firmly established in Harris County under Texas law, and it overrules Guimaraes's subject-matter jurisdiction issue. It then recharacterizes the case as involving only comity among nations, which it declares to be non-jurisdictional, and then holds was not briefed by Guimaraes and was therefore waived. And it affirms the judgment of the Harris County District Court and its jurisdiction over all matters related to the custody of the minor child in this case, N.S.B., and Guimaraes's claim of refuge in Brazil. I respectfully dissent on all these matters.

The panel opinion addresses the scheme for determining return of the child and custody proceedings under the Hague Convention. But it only selectively addresses the International Child Abduction Remedies Act (ICARA), set out in United States Code section 9003, which provides for the enforcement of rights accorded by the Hague Convention, including the right to return of an abducted child. And it ignores altogether the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), set out in Texas Family Code Chapter 152, which provides for the determination of jurisdiction over interstate and international child

custody disputes. These omissions from the standards for determining jurisdiction over return of an abducted child under the Hague Convention and jurisdiction over child custody disputes under the UCCJEA and state law, in my opinion, lead the panel to incorrect and unjust rulings.

I. BACKGROUND

As stated in the panel opinion, Marcelle Guimaraes and Christopher Brann were married and have one child, N.S.B., who was born on September 14, 2009, in Harris County, Texas, where the couple resided from the date of his birth until July 2013 and where Brann still resides. This section details the complex history of this case.

A. Guimaraes's Suit for Divorce in Harris County

On September 17, 2012, Guimaraes filed a petition for divorce against Brann in Harris County, Texas, which was assigned to the 308th District Court. Brann filed a counter-petition in the same court on October 17, 2012.

On December 17, 2012, Guimaraes filed an "Amended Petition for Divorce with Request for Emergency Temporary Orders and Emergency Temporary Restraining Orders." In her pleading, Guimaraes sought a divorce based on insupportability and cruelty, and she sought sole managing conservatorship over N.S.B. based on Brann's domestic violence and N.S.B.'s physical health, emotional

well-being, and best interest. Brann responded on December 20, 2012, by filing a "First Amended Counter-Petition for Divorce."

On January 18, 2013, the trial court entered "Agreed Temporary Orders" signed by both Guimaraes and Brann. The Agreed Orders appointed both parents as temporary joint managing conservators of N.S.B. The Agreed Orders included a possession-and-access order, granting Guimaraes "the exclusive right to designate the primary residence of [N.S.B.] within Harris County, Texas," and specifying dates and time periods during which Brann would have the right to possession of N.S.B. The Agreed Orders designated Harris County, Texas, as "the primary residence of the child . . . until modified by further order of the court of continuing jurisdiction or by written agreement signed by the parties and filed with the court."

B. Guimaraes's Removal of N.S.B. to Brazil and Initiation of Refuge and Custody Proceedings; Contemporaneous Proceedings in Texas District Court

1. Rule 11 Agreement

On May 24, 2013, Guimaraes and Brann entered into a Rule 11 Agreement, allowing Guimaraes to travel to Brazil with N.S.B. from July 2, 2013, through July 20, 2013, for a wedding. Guimaraes and N.S.B. traveled to Brazil as planned on July 2, 2013, but they did not return. Instead, Guimaraes sought sanctuary in Brazil from domestic violence and for the safety and welfare of N.S.B., who, she alleged, had witnessed the violence.

2. Guimaraes's Initiation of Proceedings in Brazilian State Court

Once in Brazil, Guimaraes initiated judicial proceedings against Brann in Bahia, Brazil, with the aim of legalizing her custody of N.S.B., and she sought temporary relief in the Brazilian state court.

On July 22, 2013, the Brazilian state trial court—the Brazilian court vested with jurisdiction over custody disputes and related matters—the 2nd Bench of Family, Successions, Orphans, Disabilities and Absences of the Circuit Court of Salvador, State of Bahia, Brazil, issued an "Interlocutory Decision." The court observed that the aim of the Hague Convention was to provide for the custody of children wrongfully removed from their country of origin by one of their parents in breach of custody rights under the law of the state in which child habitually resided. It opined that, in such a case, the parent whose custody right was breached must file an action at the Brazilian "Federal Court for the child to be returned to his/her country of origin." The court found that, by contrast, "the aim of this case is only to legalize an already existing situation in which the child lives with his mother, who even [intends] to determine the father's visitation rights"[2] and that there was, at that time, "no request for the minor to be returned to the country of origin or any elements

[2] The court's decision stated that Guimaraes's "initial petition detail[ed] that after the couple's separation, [N.S.B.] remained under the care of [Guimaraes]. While he lived abroad [in the United States], he interacted with his father and family members through the use of visitation rights. Subsequently, he came to live in Brazil."

indicating international abduction." Therefore, it determined that it had jurisdiction to "review and decide on this, at least at this stage." The court granted Guimaraes temporary custody of N.S.B. and granted Brann visitation rights.

3. Brann's Emergency Motion to Modify Temporary Orders in Harris County District Court

When Guimaraes failed to return with N.S.B. from Brazil, Brann filed a "Joint Emergency Motion to Modify Temporary Orders and Motion to Sell Property" in the Harris County District Court.

On August 9, 2013, the Harris County District Court heard Brann's motion. Brann was present and was represented by counsel at the hearing; Guimaraes appeared only through counsel. At the conclusion of the hearing, the Harris County District Court issued an "Order on Joint Emergency Motion to Modify Temporary Orders and Motion to Sell Property." In the order, the court appointed Brann as N.S.B.'s sole temporary managing conservator and Guimaraes as a temporary possessory conservator. The court further ordered that Brann "shall have the right to physical possession of the child at all times," that Guimaraes "shall deliver and surrender" N.S.B. to Brann, and that "until further order of the court . . . Guimaraes shall not have a right to possession [of] or access to the child."

C. Brann's Petition for Return of N.S.B. in Brazil's Federal Court

In October 2013, Brann filed a petition in Brazilian federal courts seeking the "search and seizure of [N.S.B.] without hearing the opposing party," pursuant to the

Hague Convention and Brazilian constitutional law (the "Provisional Remedy Action"). Brann requested that N.S.B. return to the United States under Brann's custody until the Harris County District Court determined permanent custody in the pending divorce proceeding.

On October 29, 2013, the Federal Court of the 1st Bench in Bahia, Brazil, issued a "Decision" in the Provisional Remedy Action. The Brazilian Federal Court recited the factual and procedural history of the case up to that point, including actions taken in the Harris County District Court, and noted that Brann had contacted the United States State Department to assist in the return of N.S.B.

The Federal Court dismissed Brann's "claim of absolute lack of jurisdiction [in Brazil] . . . because the [Brazilian] Federal Courts have jurisdiction to hear and decide on this action pursuant to . . . the Brazilian Federal Constitution, since this is proceeding based on the Hague Convention on the Civil Aspects of International Child Abduction." The court noted that a "search and seizure" action under the Hague Convention "does not seek to determine custody of the minor, but only to decide on the return of the child to the residence from where he/she was removed." It observed that the Hague Convention "is based toward the prevailing interest of the minor, since it was conceived to protect children from wrongful conducts." Accordingly, "the Convention limited the cases for return to the county of origin,

even in view of the wrongful conduct of the parent who has the minor, with exceptions such as the ones listed in Articles 12 and 13" of the Convention.

The Brazilian Federal Court held that, under the Hague Convention, "the removal or retention of [N.S.B.] by his mother [Guimaraes] must be considered wrongful, since it was made in breach of the custody rights assigned by the District Court of Harris County, State of Texas, USA." However, it then recited evidence "that the minor is already settled in his new environment" in Brazil, together with evidence of domestic violence by Brann and of his addiction to sex and pornography, which were supported by Brann's acknowledgment "that he suffers from such disorder, reporting that he is not able to control his compulsion." The court found that Brann "demonstrates to be psychologically unstable, lacking self-control, violent and suffering from a psychiatric disease that renders him incapable of being with [N.S.B.] without supervision, since he surrenders to his addiction at the expense of other tasks or social situations" and "admits that he does not control his violence and breaks chairs, tables, televisions and even destroys walls, given the dimension of his attacks."

The court concluded, "In view of the mental and emotional conditions of the child's father listed in the previous paragraph," there was evident risk of N.S.B.'s being subject to physical or psychological harm if he returned to the United States and started living under Brann's custody away from Guimaraes. "Therefore, there is

no question that the case being appreciated falls under the exceptions set forth in Art. 12 (2nd paragraph final part) and 13 'b' of the [Hague] Convention." The court held that the request for the "prompt return" of N.S.B. to the United States "cannot be granted," and it dismissed the preliminary injunction request and granted supervised visitation in Brazil to Brann.

The Brazilian Federal Court therefore denied Brann's petition seeking search and seizure of N.S.B. in Brazil and his return to the United States. It referred the issues of custody and visitation rights to the Brazilian state Court of Law of the 2nd Bench of Family and Successions of the Circuit Court of Salvador, in Bahia, Brazil, where Guimaraes's custody suit was pending.

D. Brann's Appeal to the Brazilian Federal Appellate Court of the Federal Trial Court's Denial of Return of N.S.B. to the United States

Brann filed an interlocutory appeal in Brazil from the Brazilian Federal Court's order denying search and seizure of N.S.B. under the Hague Convention. Brann argued that the Federal Court's order was erroneous in part because not enough time had elapsed for N.S.B. to become adjusted to his new environment in Brazil and there was no evidence N.S.B. would be subject to a serious risk of harm if he returned to Brann's custody. He also argued that only the Texas court had jurisdiction to render orders relating to custody of N.S.B. and that that court had already entered agreed temporary orders regarding custody.

On April 2, 2014, the Regional Federal Appellate Court of the First Region of Brazil issued a "Report" and an "Opinion" on Brann's interlocutory appeal from the Brazilian Federal Court's denial of search and seizure of N.S.B. The court first recited the arguments in support of N.S.B.'s return to the United States made by Brann and the intervenor, the Federal Government of the United States, and the counter-arguments made by Guimaraes. It then issued its "Opinion" stating that "the child has always lived with the mother"; that Brann, as a doctor, regularly worked long hours and night shifts; that Brann's personality was "rather confused or, at least, cannot be characterized as a model of emotional balance"; that Brann had not indicated how he intended to take care of N.S.B. alone in the United States; and that, "[a]ccordingly, it is probable that the child may be subjected to an 'intolerable situation', unless [Brann] effectively indicates how he intends to take care of the child without the presence of [Guimaraes], which [Brann] failed to state so far." It concluded, "Between the certainty that the child is currently under reasonable care of the mother's family and the uncertainty regarding how he would become if his immediate return to the home country would be determined, the 'status quo' must be maintained until the final decision." The court required "better information on how the child will be taken care of in the United States in the event the mother would not accompany him."

The court stated that the main purpose of the Hague Convention is "the child's well-being," that "separation of a four year[] old child from his mother should only be permitted in extraordinary situations," that separating N.S.B. from Guimaraes "will cause unequivocal psychic and emotional damage," and that Brann worked long hours away from home, "which can impair the care and attention that must be given to a so young child." The court recommended that Brann and Guimaraes reach an agreement regarding custody and visitation "that better suits to N.S.B.'s interests" and "that may reduce the severe effects caused by the rupture of the couple." The court further stated, "The well-being of the child surpasses the formal compliance of the Convention of Hague." The federal appellate court thus denied Brann's interlocutory appeal from the Brazilian federal court's denial of a search and seizure order under the Hague Convention.

E. Brann's Interlocutory Appeal from the Brazilian State Court Custody Proceedings

The 2nd Family and Successions Bench of Bahia—a Brazilian state court—issued an order regarding the custody and visitation of N.S.B. in Brazil. Brann filed an interlocutory appeal of this order, challenging the court's "visitation scheme" and requesting unsupervised and overnight visitation with N.S.B. On July 28, 2014, the Court of Justice for the First Civil Chamber in Bahia, issued an "Appellate Decision" of the visitation order. The Brazilian state appellate court noted that Brann had entered a psychological report into evidence that supported the trial court's visitation

order because the report "demonstrates the visitation as regulated did not cause any prejudice to the preservation of the affective liaison between father and son." The appellate court then stated:

> Certainly said decision [of the trial court] may be reviewed at any time at the satisfaction of the child's interests, with the sole condition that authorizing elements are entered into the records, such as, a social study, which is recommended.
>
> It is widely known that, in situations of conflict of parents, the interests of the children must always prevail, in accordance with the principle of the preponderant interest of the minor, which much guide any judicial decision involving children and teenagers. However, at this time the decision under appeal must be upheld under the terms it was rendered until the execution of a detailed social study.

The appellate court thus denied Brann's interlocutory appeal of the visitation order.

F. Subsequent Texas Proceedings: Guimaraes's Plea to the Jurisdiction of the Harris County District Court; Guimaraes's Mandamus to This Court; the Harris County District Court's Custody Trial

1. Guimaraes's Plea to the Jurisdiction of the Harris County District Court

On August 22, 2014, September 12, 2014, and September 15, 2014, Guimaraes filed a "Motion to Abate, Plea to the Jurisdiction and Motion to Dismiss Original Counter Petition for Divorce," a supplemental motion, and a second supplemental motion in the Harris County District Court, arguing that the Texas courts had lost subject-matter jurisdiction over the custody proceedings involving N.S.B. and related matters and that the Texas courts must enforce the Brazilian

courts' rulings denying N.S.B.'s return to the United States and awarding temporary custody of N.S.B. to Guimaraes.

On October 9, 2014, Brann filed a response to Guimaraes's plea to the jurisdiction, arguing that the Harris County District Court retained continuing, exclusive jurisdiction over the custody proceedings regarding N.S.B. and that no other court could divest the trial court of jurisdiction.

On October 13, 2014, Brann filed a second response to Guimaraes's plea to the jurisdiction, relying on a letter by Francisco George de Lima Beserra, the Head of the Brazilian Central Authority, the entity responsible for facilitating cooperation between Brazil and other countries in Hague Convention cases. In the response, Brann argued that there was no final decision on Brann's Hague Convention petition in Brazil and that the Harris County District Court retained jurisdiction to hear this case.

On October 13, 2014, the Harris County District Court trial court held a hearing on Guimaraes's plea to the jurisdiction. At the hearing, the trial court admitted into evidence the parties' Rule 11 Agreement and copies of the decisions rendered by the Brazilian courts. The trial court also admitted copies of the original petition for divorce, the amended petition for divorce, the "Agreed Temporary Orders," and the "Order on Joint Emergency Motion," as well the letter from the

head of the Brazilian Central Authority and a letter from Brann's attorney in the Brazilian proceedings.

Brann testified at the hearing, stating that, prior to Guimaraes's failure to return with N.S.B. from Brazil, Brann was regularly exercising his visitation rights, which included periods of visitation up to 30 days in duration. Brann also testified that N.S.B. had never resided anywhere other than in Harris County, Texas, prior to July 2013; that N.S.B. had been attending school in Texas prior to his removal; that Brann's parents, two brothers, and sister all lived in Texas; that Guimaraes had lived in Texas for ten years prior to July 2013; and that Guimaraes's brother has lived in Texas for sixteen years and still lived in Texas.

Brann testified that he first learned of Guimaraes's Brazilian cause of action on refuge and custody in October 2013 and that there had not been a final determination of his petition under the Hague Convention in any court in Brazil. Brann further stated that he had flown to Brazil and exercised visitation with N.S.B. approximately seven or eight times, that he traveled to Brazil on average every eight weeks, and that he had maintained a relationship with N.S.B. Brann was the only witness who testified at the hearing.

On October 27, 2014, the Harris County trial court issued an "Order Denying [Guimaraes's] Plea to the Jurisdiction and Motion to Abate." It refused to decline to exercise jurisdiction over the child custody proceedings.

2. Guimaraes's Mandamus to This Court

On December 16, 2014, Guimaraes filed a petition for writ of mandamus in this Court seeking an order compelling the Harris County District Court to vacate its October 27, 2014 order denying her plea to the jurisdiction. This Court denied Guimaraes's petition on February 3, 2015 without opinion.

3. The Harris County District Court's Divorce Trial

On February 19, 2015, the Harris County District Court tried the divorce case. Brann appeared in person. Because the Harris County District Court had threatened to issue a capias for her arrest if she came to the United States, Guimaraes petitioned the court to appear by telephone or Skype, stating that she had "knowledge regarding the physical abuse allegations and sexual addiction allegations against CHRISTOPHER BRANN." The trial court denied Guimaraes' motion, and she appeared only through counsel.

On February 25, 2015, the Harris County District Court signed a Final Decree of Divorce.

In June 2015, the court granted Guimaraes's Motion to Modify, Correct, or Reform the Judgment.

On November 5, 2015, the court signed its Modified Amended Final Decree of Divorce. In its final decree, the Harris County District Court ordered that Brann and Guimaraes were divorced as of February 19, 2015. The court (1) divided the

marital property, (2) named Guimaraes and Brann joint managing conservators of N.S.B., (3) gave Brann the exclusive right to designated the primary residence of N.S.B. within Harris County, (4) established possession and access to N.S.B., as well as child support, and (5) awarded Brann damages, attorney's fees, and costs on his tort claims against Guimaraes for interference with possessory rights over N.S.B. pursuant to Texas Family Code section 42.002.

G. The Federal Brazilian Court's Ruling on Brann's Hague Convention Petition for Return of the Child

On July 15, 2015, after the Harris County District Court signed its June 2015 Final Decree of Divorce, but before it signed the Modified Amended Final Decree of Divorce in November 2015, the Regional Federal Court of the First Region, Judicial District of the State of Bahia, issued a detailed Type A Sentence Opinion in the Hague Convention proceeding ("the Hague Convention Order") initiated by Brann in Brazil seeking the return of N.S.B. to the United States.

After setting out at length the procedural history of the proceedings, as a threshold matter, the Brazilian Federal Court again rejected Brann's argument made that the Brazilian courts absolutely lacked jurisdiction on the ground that "the Federal Court is competent to preside over and decide the present lawsuit, based on article 109, III, of the [Brazilian] Federal Constitution, as it deals with an action founded on the Hague Convention about Civil Aspects of International Child Abduction," to which Brazil and the United States are both signatories.

The Brazilian Federal Court also refused to return the entire case to the Brazilian state court, the 2nd Family and Succession Court of Salvador, as requested by Guimaraes, asserting its own jurisdiction over Brann's request for search and seizure of N.S.B. and determination of N.S.B.'s return to the United States based on the Hague Convention, which it concluded did not conflict with the determination of custody and related matters by the Brazilian state court. The Federal Court concluded that "the jurisdiction of the Federal Justice and of the State Justice can no longer be questioned, within the limits established in the abovementioned decisions [of the Brazilian courts in the case], that is, if each is acting within its sphere of jurisdiction."

The Brazilian Federal Court analyzed evidence relating to N.S.B.'s adjustments to his new environment in Brazil, evidence relating to Brann's commission of domestic violence against Guimaraes, evidence of his addiction to sex and pornography, and evidence relating to turmoil within Brann and Guimaraes's marriage, including evidence of incidents that occurred in N.S.B.'s presence. The court also addressed expert psychological reports concerning both Brann and Guimaraes, as well as reports relating to N.S.B. and his relationship with his parents. The court denied Brann's request to return the child to the United States, stating as follows:

> [Brann] claimed . . . that he will be fully capable of exercising full custody of his son, as assured to him by the Texas legal system,

provided that, when he is not at home, his son would be taken care of by the babysitter. However, as confirmed by the expert proof, [N.S.B.] is too close to his mother and needs her to keep his emotional balance, both because of his age and of the situations he experienced. Even if it were not so, if the child can stay with [his] mother and the latter has the physical, financial and psychological conditions to raise him, there is no reason for such child to be taken care of by a babysitter in the USA (even if it is not full time, that is, only when the father is not present), being kept away from [his] mother, once a babysitter, no matter how good she is, will hardly love and take care of a minor like his mother will. Additionally, the babysitter, in this case, can be Mrs. Ana Licon, who will hardly live in peace again with [Guimaraes].[3]

On the other hand, in view of what was informed and recommended by the expert, it is evident that the minor may be subject to dangers of a psychic nature, should he return to the United States and start living under the custody of the father, away from his mother, once such return can cause a significant disruption in his routine and in the environment to which he is integrated, which are fostering his emotional safety at this time of his life, not to mention that said return may subject [N.S.B.] to new conflictive situations, once his parents still have several legal disputes in course, in Brazil and in the United States, and are still unable to live in harmony.

Hence, there is no doubt that the case under analysis fits the exceptions provided for in art. 12 (2nd paragraph, final part) and 13, "b", of the [Hague] convention, which allow the judicial or administrative authority to refuse to order the return of the minor to his County of origin, when it is proven, respectively, that the child is already integrated to his/her new environment and that there is serious risk of him being subject to physical or psychic nature if the mentioned return is determined.

In view of the foregoing, the requests for search and seizure of the minor cannot be granted, nor can the ones related to him being handed

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3 Licon had testified against Guimaraes in the Harris County District Court and also participated in a deposition. The Brazilian Federal Court reviewed her deposition and found her testimony untrustworthy.

> over to [Brann] and to him returning to the United States, together with his father, as requested . . . .
>
> Since the conditions provided for in the Hague Convention for the return of the child to the United States are not met, for the reasons exposed above, the decisions on the underlying right of custody and on visitation shall be made by the competent Court to analyze such matters, which, in this case, is the Court of Law of the 2nd Court of Family and Successions of the Judicial District of Salvador . . . in relation to which a decision was rendered . . . as allowed by art. 16 of the mentioned convention.
>
> Hence, I shall not analyze the requests made in the Complaint, in the sense that the minor be kept under [Brann's] custody, until the final custody is established in the main action, in course in the United States, as well as in the sense that a visitation schedule be stipulated for the parent who does not have custody of the minor, because such matters shall be analyzed by the State Justice, for the reasons exposed in the previous paragraph and in the item "Preliminary arguments" of this decision . . . .
>
> In view of the foregoing, I REJECT THE REQUESTS for search and seizure of the minor, his handing-in to [Brann] and his return to the United States, together with his father, on the grounds exposed above . . . .

The Federal Court ruled that further requests for custody and visitation be decided by the Brazilian state court.

H. Guimaraes's Motion for New Trial in Harris County District Court Based on the Brazilian Federal Court's Hague Convention Order

On December 4, 2015, Guimaraes filed a motion for new trial in the Harris County District Court, citing the Brazilian Federal Court's Hague Convention Order of July 15, 2015. Guimaraes also filed a second plea to the jurisdiction, again

arguing that the Harris County District Court lacked subject-matter jurisdiction based on the Brazilian courts' resolution of Brann's Hague Convention petition.

On January 15, 2016, an associate judge of the Harris County District Court summarily denied Guimaraes's post-verdict motions.

On February 3, 2016, Guimaraes filed this appeal.

I. The Brazilian Supreme Federal Court's Rejection of Brann's Extraordinary Appeal

On June 23, 2016, while this appeal from the Harris County District Court's final judgment was pending in this Court, the Supreme Federal Court of Brazil denied the "Federal District Extraordinary Appeal with Review" filed by Brann against the decision of the Brazilian Superior Court of Justice, brought pursuant to the Brazilian Constitution, in which Brann asserted a conflict of jurisdiction between his search and seizure suit presented in the Brazilian Federal Court based on the Hague Convention and Guimaraes's custody and visitation suit presented in the Brazilian state court, the 2nd Family and Succession Court of Salvador.

The Brazilian Supreme Federal Court quoted with approval the conclusion of the Federal Superior Court judgment under appeal:

> [T]he minor's custody will not be decided in the ongoing search and seizure lawsuit filed in the Federal Court, since this is an issue for which there is an appropriate forum, whether in the child's country of origin or in Brazil.
>
> In fact, if it is determined that the child should return to the country of origin, it is there that the custody and visitation rights will be decided.

> On the other hand, if it is decided that the child not return, the Family Court will have jurisdiction to issue judgment on these matters.
>
> It should be highlighted that the objective of the Hague Convention, ultimately, is to assure that the natural judge makes these types of decisions, which is the judge of the child's habitual residence to resolve such issues.

J. The Brazilian Regional Federal Court's Vote Affirming the Supreme Federal Court's Hague Convention Decision

On October 5, 2016, also while this appeal from the Harris County District Court's final judgment was pending, the appellate Regional Federal Court of the First Region in Brazil issued a "Report" and "Collective Vote" affirming the July 15, 2015 Hague Convention Order of the Brazilian Federal Court.

The Collective Vote, or Declaration, of Federal Appellate Judges recapitulated the long and detailed Report by Federal Appellate Judge Moreira Alves, which set out the entire history of both the search and seizure suit and the custody proceedings in Brazil and justified them under the Hague Convention and the Brazilian Constitution, with legal and evidentiary analysis and argument, findings, and conclusions and affirmed the Brazilian Federal Court's ruling.

The Collective Vote preliminarily highlighted "the relevance of the trial held in the United States in favor of the child's father" and Brazil's respect for "what was decided there" in a court of concurrent jurisdiction pursuant to Article 22 of the Brazilian Civil Procedure Code. The court further recognized that the Brazilian Federal Justice Court was deliberating solely on the return of the child under the

Hague Convention, not on custody of the child. But the court also highlighted that the United States proceeding was not res judicata in the sphere of family law and that the Hague Convention could not be interpreted that way, despite the arguments of Brann and the United States government. The court pointed out that the objective of the Hague Convention and of the Brazilian Constitution was child protection, and it recited the provisions of Articles 3, 12, and 13 of the Hague Convention, dealing with the wrongful abduction of a child and proceedings in such a case.

The court, quoting from the Brazil Federal Court's July 15, 2015 Hague Convention Order, stated that "the removal or retention of the minor [N.S.B.] by his mother [Guimaraes] should be considered wrongful, since it was done contrary to the custody rights assigned by the Harris County District Court, State of Texas, USA." However, it observed that the Hague Convention "was established with the primary purpose of protecting the interests of the child, as found expressly in the preamble," and, "[t]o that end, said convention, in Article 12 and 13, provides exceptions to the return of the child to the country of origin, even if there was wrongful conduct by the parent in custody of the minor as can be verified below." Accordingly, the court analyzed the case to determine whether it fell within the exceptions to return of the child set out in Articles 12 and 13 of the Hague Convention. Reviewing the case, the court determined that the evidence showed that N.S.B. was integrated into his new environment, as required to satisfy Article 12. It

also determined that "[t]here is no doubt . . . that [Guimaraes] was a victim of domestic violence and that [Brann] himself acknowledged this fact, both in documents attached to the record as well as in his own deposition."

The court acknowledged and considered Brann's arguments "that he would be fully able to exercise sole custody, as the Texas court order granted," in that N.S.B. would be in the care of a babysitter when he was not home. But it concluded that, "due to what has been reported and recommended by the expert, it is clear there is a risk of [N.S.B.] being subjected to dangers of a psychological order if he returns to the United States and comes to live in the father's custody away from his mother." "Thus," it concluded, "there is no doubt that the case under consideration falls within the exceptions provided for in art. 12 (2nd paragraph, final part) and 13, 'b' of the [Hague C]onvention," allowing the judicial authority to refuse to order N.S.B.'s return to his country of origin. Accordingly, it held that Brann's request for search and seizure of the child "may not be granted."

The Brazilian Regional Federal Court then held that, because the Hague Convention conditions for return of the child to the United States had not been met, "the decisions on the merits of custody and on access should be made by the Court of competent jurisdiction to consider such matters, which, in this case, is the Judge of Law of the 2nd Family and Probate Court of the County of Salvador," Brazil, which processed the case and "where the decision was handed down."

The Brazilian Regional Federal Court denied the interlocutory appeal filed by Brann and dismissed his petition, confirming the sentence of the Brazilian Federal Trial Court.

II. SUBJECT-MATTER JURISDICTION OVER INTERNATIONAL CHILD ABDUCTION RIGHT OF RETURN AND CUSTODY

In her first issue on appeal, Guimaraes contends that the Brazilian courts properly exercised jurisdiction over this Hague Convention case; that the Brazilian Federal Appellate Court correctly issued a unanimous opinion applying two exceptions to mandatory return of a child abducted by a parent under the Hague Convention—Articles 12 and 13b; and that Brazil's highest federal court, the Brazil Supreme Federal Court, correctly upheld the jurisdiction of the Brazilian state courts over custody and visitation, divesting the Harris County District Court of jurisdiction over this case. In her second issue, Guimaraes argues that the Harris County District Court denied her constitutional right to due process when it denied her motion to appear and testify at trial via telephone or Skype.

Guimaraes argues that, once the Brazilian courts determined that the Hague Convention did not require that N.S.B. be returned to the United States, the Harris County District Court was divested of jurisdiction over the custody issue and related issues as a matter of law, including refuge, and jurisdiction over those matters was established in the Brazilian state courts. I agree.

The panel opinion, however, "conclude[s] that this case does not involve an issue of subject-matter jurisdiction, but, instead, presents an issue of international comity," which it construes as a *non-jurisdictional* issue not dependent on any determinations regarding jurisdiction under the Hague Convention. Slip Op. at 20. The opinion then asserts, "The issue in this case is not whether the 308th District Court had subject-matter jurisdiction; it undoubtedly and indisputably did" because Guimaraes filed suit for divorce in Harris County, and the 308th District Court "was the first court to address custody issues." *Id.* at 20–21. Thus, "[t]he issue," the opinion asserts, "is whether the 308th District Court abused its discretion when it refused to extend comity to the Brazilian courts' resolution of Brann's Hague Convention Petition." *Id.* at 21. Accordingly, it opines that, "to the extent that Guimaraes's first issue on appeal complains of a lack of subject-matter jurisdiction, we overrule it." *Id.* at 21.

The opinion then determines, in two sentences that, although "Guimaraes argues that the trial court 'must give deference' to the Brazilian court, [she] provides this Court with no analysis of the Brazilian courts' decisions or argument and analysis relating to comity. Thus, the issue of international comity is waived." *Id.* The panel thus asserts the primacy of Texas family law *in the absence of an international custody dispute subject to ICARA* over the provisions of the Hague

Convention and remedies recognized by Texas in the UCCJEA, which it ignores in determining the court of proper jurisdiction over custody and related matters.

Accordingly, I respectfully dissent from the denial of en banc reconsideration. I would reverse the judgment of the Harris County District Court, void the custody orders and related orders of that court, and dismiss the Harris County proceedings in accordance with this opinion.

The threshold issue in this case, raised by Guimaraes, is whether the Harris County District Court or the Brazilian courts had jurisdiction in this international child abduction case to determine the right to return of N.S.B. under the Hague Convention and to determine custody and related matters. This issue requires this Court to determine the nature and extent of the Texas courts' and the Brazilian courts' jurisdiction under the Hague Convention, the International Child Abduction Remedies Act (ICARA), which implements the Hague Convention, and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which provides for the determination of jurisdiction in interstate and international child custody disputes.

A. Standard of Review of Subject-Matter Jurisdiction

Subject-matter jurisdiction presents a question of law that courts review de novo. *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 166 (Tex. 2013). Subject-matter jurisdiction is "essential to a court's power to decide a case." *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013) (per curiam)

(quoting *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000)); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). "Subject matter jurisdiction is never presumed and cannot be waived." *Tex. Ass'n of Bus.*, 852 S.W.2d at 443–44. It may be raised for the first time on appeal by the parties or by the Court. *Id.* at 445–46. "[S]ubject-matter jurisdiction is a power that 'exists by operation of law only, and cannot be conferred upon any court by consent or waiver.'" *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (quoting *Fed. Underwriters Exch. v. Pugh*, 174 S.W.2d 598, 600 (Tex. 1943)); *Seligman-Hargis v. Hargis*, 186 S.W.3d 582, 584-85 (Tex. App.—Dallas 2006, no pet.) ("[I]t is well settled that subject-matter jurisdiction cannot be conferred by consent, waiver, or estoppel.").

A trial court has subject-matter jurisdiction "when the nature of the case falls within the general category of cases the court is empowered, under applicable statutory and constitutional provisions, to adjudicate." *Diocese of Galveston–Houston v. Stone*, 892 S.W.2d 169, 174 (Tex. App.—Houston [14th Dist.] 1994, orig. proceeding). A judgment is void if the court rendering the judgment does not have subject-matter jurisdiction. *See Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990) (per curiam).

B. The Texas Courts' Duty to Take Judicial Notice of the Adjudicative Facts Relating to Subject-Matter Jurisdiction

This Court has both the right and the duty to consider facts necessary to the Harris County District Court's exercise of jurisdiction in this Hague Convention case and to determine whether that court properly exercised its jurisdiction. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 443 ("Subject matter jurisdiction is essential to the authority of a court to decide a case."). Accordingly, this Court has both the right and the duty to consider adjudicative facts relating to subject-matter jurisdiction brought to the court's attention by a party who has supplied the necessary information. *See* TEX. R. EVID. 201(c) (providing that court "must" take judicial notice of adjudicative facts "if a party requests it and the court is supplied with the necessary information").

Matters of public record, such as the Brazilian court records brought to this Court's attention by Guimaraes, are subject to mandatory judicial notice under Rule 201. *See* TEX. R. EVID. 201(b) (providing that court may judicially notice adjudicative fact "that is not subject to reasonable dispute" because fact "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). Therefore, this Court is required to take judicial notice of the contents of the Brazilian court records in the record of this case.

C. Subject-Matter Jurisdiction Over International Child Abduction Under the Hague Convention and ICARA

The United States and Brazil are both signatories to the Hague Convention, whose provisions Congress has implemented through ICARA. *Abbott v. Abbott*, 560 U.S. 1, 5, 130 S. Ct. 1983, 1987 (2010). "The Convention seeks 'to secure the prompt return of children wrongfully removed or retained in any Contracting State,'" and it provides that such "removal or retention . . . is to be considered wrongful where . . . it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention." *Id.* at 8, 130 S. Ct. at 1989 (quoting Hague Convention, 51 Fed. Reg. at 10,498).[4]

ICARA provides that United States state courts and federal district courts "shall have concurrent original jurisdiction of actions arising under the [Hague] Convention." 22 U.S.C.A. § 9003(a). And it provides that any person seeking to initiate judicial proceedings under the Convention for the return of child "or for arrangements for organizing or securing the effective exercise of rights of access" may file a petition for the relief sought in any court that has jurisdiction over the action and is authorized to exercise jurisdiction in the place where the child is located

[4] The Second Circuit Court of Appeals opinion primarily relied on by the panel opinion in construing the Hague Convention, *Croll v. Croll*, 229 F.3d 133, 137 (2d Cir. 2000), was expressly abrogated by *Abbott*. *See Abbott v. Abbott*, 560 U.S. 1, 22, 130 S Ct 1983, 1997 (2010).

at the commencement of the action. *Id.* § 9003(b). The court in which the action is brought "shall decide the case in accordance with the Convention." *Id.* § 9003(d). Accordingly, Brann correctly brought his suit for search and seizure of N.S.B. and his return to the United States in federal court in Brazil, where the child was located at the time of Brann's petition for return, and the Brazilian federal court properly determined that it had jurisdiction over that action.

A petitioner seeking return of the child is required to establish by a preponderance of the evidence "that the child has been wrongfully removed or retained within the meaning of the Convention." *Id.* § 9003(e)(1)(A). A respondent who opposes the return of the child has the burden of establishing "by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies" or establishing "by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies." *Id.* § 9003(e)(2).

The Brazilian federal courts concluded that Brann established wrongful removal and that Guimaraes, the respondent, established the applicability of exceptions to return set out in articles 12 and 13b of the Hague Convention. The Brazilian federal courts further concluded that the Brazilian state courts had jurisdiction to determine custody matters in the case. This determination accords with the construction of ICARA by the United States courts as well. *See Diorinou*

v. Mezitis, 237 F.3d 133, 140 (2nd Cir. 2001) (stating that, in suit under ICARA, federal district court has authority to determine merits of abduction claim, but not merits of underlying custody claim); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) (stating same); *Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 841 (S.D. Tex. 2006) (stating same).

ICARA further provides:

> Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

22 U.S.C.A. § 9003(g).

However, as the panel opinion points out, the United States federal courts have construed this section to mean that United States courts must afford full faith and credit only to judgments of other United States federal and state courts, due to ICARA's special definition of "States" as states and territories of the United States and the District of Columbia, and *not* to foreign judgments. *See Diorinou*, 237 F.3d at 142; *Van Driessche*, 466 F. Supp. 2d at 843. Instead, those courts have held that the enforceability of foreign judgments under the Hague Convention is "a matter of comity." *Diorinou*, 237 F.3d at 142 (citing *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S. Ct. 139, 214 (1895)). Thus,

> [e]ven if the limited scope of [ICARA] section 4 implies a legislative preference not to extend formal full faith and credit recognition to foreign judgments, [there is] nothing in ICARA or its legislative history

> to indicate that Congress wanted to bar the courts of this country from giving foreign judgment the more flexible deference normally comprehended by the concept of international comity.

Id. at 143. "Although deference as a matter of comity often entails consideration of the fairness of a foreign adjudicating system, a case-specific inquiry is sometimes appropriate." *Id.* (internal citations omitted).

In this case, how much deference to give the Brazilian courts' judgments is not a matter of guess-work because of section 9003(h) of ICARA, which provides that remedies established by the Hague Convention are not exclusive but "shall be in addition to remedies available under other laws or international agreements." 22 U.S.C.A. § 9003(h). One of those "other laws" is the UCCJEA, adopted by Texas, which governs jurisdiction over interstate and international custody disputes.

D. The UCCJEA

The determination of jurisdiction in international child custody disputes subject to the Hague Convention is governed not only by the Convention but also by the UCCJEA, set out in Texas Family Code Chapter 152. *See* TEX. FAM. CODE ANN. §§ 152.001–.317; *Seligman-Hargis*, 186 S.W.3d at 585–86.

With respect to international custody disputes, the UCCJEA provides that "[a] court of this state shall treat a foreign county as if it were a state of the United States for the purpose of applying this subchapter," regarding the application and construction of the UCCJEA, specifically including its international application,

"and Subchapter C," regarding determinations of jurisdiction. TEX. FAM. CODE ANN. §152.105(a). The UCCJEA further provides that "a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of [the UCCJEA] must be recognized and enforced" under the Act unless "the child custody law of a foreign country violates fundamental principles of human rights." *Id.* § 152.105(b), (c).

Accordingly, "a court of this state may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of Child Abduction as if it were a child custody determination." *Id.* § 152.302. And "[a] court of this state *shall* recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this chapter . . . ." *Id.* § 152.303(a) (emphasis added). In this regard, "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott*, 560 U.S. at 10, 130 S. Ct. at 1990 (quoting *Medellin v. Texas*, 552 US. 491, 506, 128 S. Ct. 1346, 1357 (2008)). A court consults the law of the country that granted the custody right to determine the content of the right, while following the Convention's text and structure to decide the nature of the right. *See id.*

III. APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

Here, Guimaraes invoked the jurisdiction of the Brazilian state courts to determine the issues of refuge and child custody, and Brann invoked the jurisdiction

of the Brazilian federal courts to determine his right to return of N.S.B. to Texas under the Hague Convention. Brann asserted that N.S.B. had been wrongfully removed by Guimaraes in violation of temporary orders issued by the Harris County District Court in connection with their divorce. Both courts addressed their own jurisdiction as threshold matters. The Brazilian state court, the 2nd Family and Successions Court of Bahia, determined that it had provisional jurisdiction over the refuge and custody dispute pending the final determination of the jurisdictional issues under the Hague Convention by the Brazilian federal courts. The Brazilian federal courts determined at each level that they had jurisdiction to determine whether the child was required to be returned under the plain language and intent of the Hague Convention. And they determined that, although N.S.B. had been wrongfully removed from the United States, his country of origin, the Brazilian state courts had jurisdiction to determine custody and related matters under two exceptions to wrongful removal.

The panel opinion disagrees with the Brazilian courts' determination that they had jurisdiction to decide both Brann's petition for return of the child under the Hague Convention and the underlying custody and refuge matters and that their judgments must be upheld under principles of international comity, and it affirms both the jurisdiction of the Harris County District Court over the custody dispute and related matters and its judgment on these matters. I disagree with the panel.

The first issue that must be determined is what the Brazilian courts decided regarding their own jurisdiction and whether it comports with a fair reading of the Hague Convention and ICARA. The next issue is whether this Court's panel opinion and judgment are in accord with the UCCJEA, Family Code section 152.105, which provides that "a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of [the UCCJEA] must be recognized and enforced" under the Act unless "the child custody law of a foreign country violates fundamental principles of human rights." TEX. FAM. CODE ANN. § 152.105(b), (c); *see also id.* § 152.303 ("A court of this state shall recognize and enforce a child custody determination of a court of another state [defined as including a foreign state] if the latter court exercised jurisdiction in substantial conformity with [the Act] . . . .").

A. Whether the Judgments of the Brazilian Federal and State Courts in this Case Should be Recognized and Enforced by the Texas Courts

Here, it is undisputed that Brann had a right of access to N.S.B. protected by the Hague Convention and that the Hague Convention permits a parent with a right of access to seek return of the child for wrongful removal. *See Abbott,* 560 U.S. at 20, 130 S. Ct. at 1995 ("[T]he Convention provides a return remedy for violations of *ne exeat* rights."). However, while a parent possessing a right of custody in an international child abduction dispute may seek return of a wrongfully removed child under the Hague Convention, and the courts of this state may enforce such an order,

a return order is not automatic. *See id.* at 22, 130 S. Ct. at 1997. "Return is not required if the abducting parent can establish that a Convention exception applies." *Id.*

In deciding Brann's Provisional Remedy Action for search and seizure of N.S.B. under the Hague Convention, the Brazilian Federal Court considered and rejected Brann's "claim of absolute lack of jurisdiction [in Brazil] . . . because the [Brazilian] Federal Courts have jurisdiction to hear and decide on this action pursuant to . . . the Brazilian Federal Constitution, since this is a proceeding based on the Hague Convention on the Civil Aspects of International Child Abduction." It observed, "The Hague Convention . . . is based toward the prevailing interest of the minor, since it was conceived to protect children from wrongful conducts." And it recognized that "the Convention limited the cases for return to the county of origin, even in view of the wrongful conduct of the parent who has the minor, with exceptions such as the ones listed in Articles 12 and 13 of the [Convention]." The court then recited the facts and concluded that the exceptions in both Article 12 and Article 13b applied.

As this part of the Brazilian Federal Court's judgment expressly follows the language and purpose of the Brazilian Constitution and the Hague Convention, there is nothing in this part of the judgment, or the parallel judgments of the higher Brazilian federal courts, that "violates fundamental principles of human rights."

Accordingly, the refusal of Texas courts to grant comity to the Brazilian courts' judgments must turn on this Court's determination that the Brazilian courts' construction of Articles 3, 12, and 13 of the Hague Convention, regarding wrongful removal and providing exceptions to return of the child, are not in substantial compliance with the provisions of the Hague Convention and, instead, violate fundamental principles of human rights. And this is effectively what this Court holds. I disagree.

B. Article 3 of the Hague Convention: Wrongful Removal

The Hague Convention requires that a petitioner seeking to have a child returned from the nation to which he was abducted, as Brann did here, must first establish by a preponderance of the evidence "that the child has been wrongfully removed or retained within the meaning of the Convention." 22 U.S.C.A. § 9003(e)(1)(A). The removal of a child from the country of his habitual residence is wrongful under the Article 3 of the Hague Convention if a person in that country is, or otherwise would be, exercising custody rights to the child under that country's law immediately before the moment of removal. *See* Hague Convention, 51 Fed. Reg. at 10,498.

To show that the removal or retention was wrongful, the petitioner must establish that the removal or retention:

> (1) 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
>
> (2) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Id.; *see Abbott*, 560 U.S. at 8, 130 S. Ct. at 1989.

Once a petitioner has established that the retention or removal was wrongful and in violation of the petitioner's custodial rights, the child must be promptly returned to his habitual residence unless the respondent demonstrates that "one of the narrow exceptions set forth in the Convention applies." 22 U.S.C.A. § 9001(a)(4).

Here, the Brazilian courts found that N.S.B.'s removal from the United States violated Harris County District Court custody orders and was wrongful. However, they found that the Brazilian courts were entitled to exercise jurisdiction over the custody proceedings under the last part of the second paragraph of Article 12 and Article 13(b) of the Hague Convention.

I agree, as does the panel, that N.S.B.'s removal from the United States was wrongful under Article 3 of the Hague Convention and that he should have been returned unless an exception to Brann's right to his return applied.

C. Article 12 of the Hague Convention: The "Well-Settled" Exception

Article 12 of the Hague Convention provides:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Hague Convention, 51 Fed. Reg. at 10,499.

Thus, even when the proceedings have been commenced after the expiration of one year, the court shall order the return of the child unless a party demonstrates that the child is now settled in his new environment. *See id.*; 22 U.S.C.A. § 9003(e)(2)(B) (providing that Hague Convention respondent must establish this exception to return of child by preponderance of evidence); *Velez v. Mitsak*, 89 S.W.3d 73, 81 (Tex. App.—El Paso 2002, no pet.) (stating that if respondent does not establish this defense, return of child is mandatory, but if respondent does establish defense, return of child is matter of judicial discretion).

This Court concluded that "the 'well-settled' exception found in the second paragraph of article 12 does not apply when the petitioner files his Hague Convention petition seeking to have the child returned *within* one year of the child's removal." Slip Op. at 27 (citing *In re A.V.P.G.*, 251 S.W.3d 117, 124 (Tex. App.—Corpus Christi 2008, no pet) ("Although not specifically mentioned in the order, the

trial court must have made the determination that [the petitioner] did not commence proceedings within one year in order to go further to find that the children were well-settled."), and *Van Driessche*, 466 F. Supp. 2d at 847–48 (holding "well-settled" defense cannot be invoked unless (1) petition was filed more than one year after child's removal and (2) child has become well settled in new environment)). This Court reasoned that Article 12 could not apply because "Brann filed his Hague Convention Petition within one year of N.S.B.'s removal to Brazil." *Id.* And it faulted the Brazilian court for "determin[ing] that it would interpret article 12 of the Hague Convention in accordance with the Brazilian Constitution, which requires an inquiry into the best interest of the child." *Id.*

I agree that the plain language of Article 12 can be construed as providing that the "well-settled" exception to return of the child cannot be invoked unless return of the child was not sought for more than a year in that the caveat "unless it is demonstrated that the child is now settled in its new environment" is added to the second paragraph of Article 12 and therefore can be construed as applying only when removal is not sought within the first year. But such a strict construction of this exception conflicts with several principles governing construction of the Hague Convention.

First, "In interpreting any treaty, '[t]he opinions of our sister signatories . . . are entitled to considerable weight.'" *Abbott*, 560 U.S. at 16, 130 S. Ct. at 1993. This Court accords the opinions of the Brazilian courts no weight.

Second, this harsh and cramped construction of the text of Article 12 fits awkwardly with the UCCJEA's provision that "[a] court of this state shall treat a foreign county as if it were a state of the United States for the purpose of applying this subchapter," regarding the application and construction of the UCCJEA, specifically including its international application, "and Subchapter C," regarding jurisdiction over child custody disputes. TEX. FAM. CODE ANN. § 152.105(a). And it is likewise in tension with the UCCJEA's provision that "a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of [the UCCJEA] must be recognized and enforced" under the Act unless "the child custody law of a foreign country violates fundamental principles of human rights." *Id.* § 152.105(b), (c).

Construing the last part of Article 12—allowing for the exception to return of the child when the child is "well-settled" to apply only when proceedings for the child's return to the state of origin are commenced after one year—can lead to unintended consequences, in that a parent who sought return 364 days after the child was wrongfully removed would automatically be entitled to return of the child, whereas when a parent sought return 366 days after removal, the respondent parent

seeking to avoid return of the child would have to prove by a preponderance of the evidence that the child was settled in his new home. But *Abbott* states that return of the child "is not automatic . . . . if the abducting parent can establish that a Convention exception [to return] applies." 560 U.S. at 22, 130 S. Ct. at 1997.

Admittedly the counter-argument is that the parent *cannot* establish an exception under Article 12 if proceedings for return were filed within one year. But then that counter-argument runs up against the problem that the Hague Convention, the Brazilian Constitution, the UCCJEA, and *Abbott* all follow the "mandate . . . 'that the interests of children are of paramount importance in matters relating to their custody.'" *Abbott*, 560 at 20, 130 S. Ct. at 1996 (quoting Hague Convention preamble). Yet this Court directly contradicts these authorities and expressly *rejects* the Brazilian court's "determin[ation] that it would interpret article 12 of the Hague Convention in accordance with the Brazilian Constitution, which requires an inquiry into the best interest of the child." Slip Op. at 27.

Finally, it appears that the Brazilian courts were reading both provisions of Article 12 as reinforcing each other, and not as acting as independent provisions. This view is strengthened by the realities of the case, as Brann's appeals of the denial of his petition for return of N.S.B., if not the petition itself, were not initiated in the Brazilian federal appellate courts until well over a year after N.S.B. was abducted to Brazil and were not decided until more than two years had elapsed, and, during that

time, the Brazilian courts had consistently held that Article 13 of the Hague Convention, as well as Article 12, protected N.S.B. from return to the United States. And they had conducted extensive inquiries into how well-established N.S.B. was in Brazil, placing his well-being paramount in their considerations.

I conclude that great deference should be given to the Brazilian courts' interpretation of the exception to return set out in Article 12 of the Hague Convention, especially in conjunction with the courts' holding that the Article 13 exception applied, which is entirely in step with the objectives of the Hague Convention. I would hold that Guimaraes did establish by a preponderance of the evidence that N.S.B. was well-settled in Brazil by the time any action was taken by any court on Brann's petition for return and that, therefore, this exception did apply to establish jurisdiction over both the petition for return and the custody proceedings in the Brazilian courts. However, even if I were to agree with this Court's opinion regarding Article 12, I would still find that the Brazilian courts properly determined that return of N.S.B. was not required under Article 13 of the Hague Convention.

D. Article 13 of the Hague Convention: The "Grave Risk" Exception

Article 13 of the Hague Convention provides:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
>
> . . . .

> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Hague Convention, 51 Fed. Reg. at 10,499.

The panel opines,

> Under the grave-risk exception, a respondent must establish that there is "a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." "Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court's determination." The grave-risk exception is narrowly interpreted, and the standard for establishing the existence of a grave risk of harm is high. A respondent must prove the allegation of grave risk by clear and convincing evidence to establish the exception.

Slip Op. at 29 (internal citations omitted).

I agree with the panel's statement of the law governing the exception to return of an abducted child set out in Article 13 up to this point in that ICARA expressly requires proof of this exception to return of the child by clear and convincing evidence, while requiring only a preponderance of the evidence to prove that a child is well-established in a new home. *See* 22 U.S.C.A. § 9003(e)(2).

However, the panel opinion goes on to state, "There is no clear definition of what constitutes grave risk." Slip Op. at 29 (citing *Ischiu v. Gomez Garcia*, 274 F. Supp. 3d 339, 350 (D. Md. 2017)). And it states, "Courts agree that the risk to the child must be more than 'merely serious,' and the defense 'may not be used as a vehicle to litigate (or relitigate) the child's best interests.'" Slip Op. at 30 (quoting

Ischiu, 274 F. Supp. 3d at 350, and *Danaipour v. McLarey*, 286 F.3d 1, 14 (1st Cir. 2002)).

This statement of the law is misleading in its omissions, including its omission of the importance of the UCCJEA and Texas law in determining what constitutes a "grave risk" to the child. And it ignores the results of the application of this law under the complete facts of this case.

The panel opinion states, "It is true that, in this case, the Brazilian court heard some evidence regarding domestic abuse against Guimaraes and Brann's alleged addiction to pornography. However, there was no evidence of any abuse or inappropriate conduct directed at N.S.B." Slip Op. at 31. It opines, "[T]he Brazilian court emphasized N.S.B.'s closeness to Guimaraes," stating that it would be harmful for him to be without his mother and left in the care of a babysitter while his father worked, and it concludes,

> In so holding, the Brazilian court improperly based its assessment of "grave harm" on what it perceived to be the best interest of the child, i.e., living with his mother, instead of being cared for by a babysitter while his father worked. This is exactly the sort of best-interest review the Hague Convention is designed to prohibit. *See* Hague Convention, 51 Fed. Reg. at 10,510 (stating that "grave harm" exception "was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interest").
>
> Based on its over-expansive reading of the "grave harm" exception and its determination that remaining with Guimaraes would be in the child's best interest, the Brazilian Court "clearly misinterpret[ed] the Hague Convention, contravene[ed] the Convention's fundamental premises or objectives, or fail[ed] to meet a minimum standard of reasonableness."

> *Smedley[v. Smedley]*, 772 F.3d [184,] 189 [(4th Cir. 2014)] (quoting *Asvesta [v. Petroutsas]*, 580 F.3d [1000,] 1014 [(9th Cir. 2009)]). As such, the trial court did not abuse its discretion in refusing to extend comity to the Brazilian Court's determination that the "grave harm" exception applied.

Id. at 32–33.

I could not disagree more strongly with the panel opinion's assessment of the evidence in support of the Brazilian courts' determination that N.S.B. would be subject to "an intolerable situation" if returned to the United States. Nor can I agree with the panel opinion's conclusions that the "grave risk" exception to return of the child to Texas under Article 13 of the Hague Convention does not apply and that "the trial court did not abuse its discretion in refusing to extend comity to the Brazilian Court's determination that the 'grave [risk]' exception applied." *See id.* at 33.

To reach its conclusions and its holding, the panel ignores voluminous evidence of domestic abuse, physical violence (including breaking furniture and smashing in a wall), and psychological abuse directed at Guirmaraes by Brann, sometimes in N.S.B.'s presence, admitted to by Brann and substantiated by expert witness reports—all included in the record of this case. It also ignores Brann's pathological addiction to pornography, likewise admitted to by Brann, which had resulted in several unsuccessful attempts at rehabilitation—also included in the record and substantiated by expert reports on the psychological effect such behavior

would have on a young child. It ignores the Brazilian courts' conclusion that the babysitter with whom Brann intended to leave the child had not appeared credible in her deposition testimony against Guimaraes. And it ignores the fact that Guimaraes was not allowed by the Harris County judge to appear in the Harris County District Court to present her case—either in person, on threat of arrest, or by Skype.

Perhaps most glaring is the panel's failure even to acknowledge—much less to enforce—the provisions of UCCJEA that govern the enforcement of foreign judgments, including the judgments of sister signatories to the Hague Convention, by the courts of this state in child custody matters and that, therefore, spell out when comity should be allowed to the judgments of foreign courts in these matters. *See* TEX. FAM. CODE ANN. § 152.105(a) ("A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying this subchapter . . . ."), and § 152.302 ("[A] court of this state may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination.").

The panel ignores the fact that the record clearly shows, and the Brazilian courts found, that Brann travels frequently to Brazil and is accorded full visitation rights there, whereas the Harris County District Court threatened Guimaraes with arrest if she sought to protect her parental rights in that court and refused to allow

her even to appear by Skype to defend her constitutional rights to due process as a fit parent at trial. It thereby blatantly violated her constitutional rights as a fit parent involved in a custody dispute. *See Troxel v. Granville*, 530 U.S. 57, 66, 68, 120 S. Ct. 2054, 2060, 2061 (2000) (holding that Due Process Clause of Fourteenth Amendment "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children" and stating that presumption exists that "fit parents act in the best interests of their children"). Thus, it is not the *Brazilian* courts' custody determinations, but *the Harris County District Court's judgment* regarding visitation and custody that violates fundamental human rights. For it is the Harris County District Court that refused to accord due process to Guimaraes by threatening her with arrest if she were to appear in this county to defend her parental rights as a fit parent; by denying her fundamental right to appear even by Skype to defend her rights as a fit parent; and by deciding custody matters *solely* on the basis of Brann's self-serving representations. This violation of the United States Constitution entails that the *Texas* custody determination, not the *Brazilian* custody determination, is unenforceable under the Hague Convention. Yet this Court enforces it and thereby denies Guimaraes constitutional due process.

Nor is this the only violation of the requirements of the Hague Convention by the Harris County District Court's custody determinations that the panel opinion endorses and approves. Texas Family Code section 153.001, governing all custody

disputes under Texas law, provides that "[t]he public policy of this state is" not only to "(1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child," but also to "(2) provide a safe, stable, and nonviolent environment for the child." TEX. FAM. CODE ANN. § 153.001. This provision is ignored and violated by the Harris County District Court's custody orders—affirmed by this Court—in that it utterly deprives Guimaraes of the exercisable right to have frequent and continuing contact with her son (unlike the Brazilian courts' custody orders, which allow visitation for Brann, and which he admittedly exercises). And it places Brann in the position of managing conservator of N.S.B. with the right to determine his place of residence in Guimaraes's complete absence, despite Brann's well-substantiated history of domestic violence and failure to demonstrate his ability to provide a safe, stable, and nonviolent environment for N.S.B., despite repeated invitations from the Brazilian courts that he do so, and despite the Brazilian courts' determinations that the Hague Convention did not require the return of N.S.B. to this country and that Guimaraes was entitled to refuge in Brazil.

Texas Family Code section 153.002 provides, "The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." *Id.* § 153.002. This substantive provision for the enforcement of Texas child custody laws is identical to

the Hague Convention and to the UCCJEA. It is not only ignored by the Harris County District Court's custody and possession orders but expressly rejected by this Court as applicable in affirming those orders.

In addition, Texas Family Code section 153.004 provides, among other things,

> (a) In determining whether to appoint a party as a sole or joint managing conservator, *the court shall consider evidence of the intentional use of abusive physical force . . . by a party directed against the party's spouse [or] a parent of the child* . . . within a two-year period preceding the filing of the suit . . .
>
> (b) *The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past . . . physical . . . abuse by one parent directed against the other parent [or] a spouse . . . .*

Id. § 153.004(a)–(b) (emphasis added). The statute directs that courts "shall consider the commission of family violence . . . in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator," and that it "may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that . . . there is a history or pattern or committing family violence during the two years preceding the date of the filing of the suit" unless the court "finds that awarding the parent access to the child would not endanger the child's physical health or emotional welfare and would be in the best interest of the child, and . . . renders a possession order that is designed to protect the safety and well-being of the child and any other person who has been a victim of family violence committed by the parent . . . ." *Id.* § 153.004(c)–(d-1).

Here, the record shows that the Harris County District Court entirely ignored the well-documented pattern of physical abuse directed at Guimaraes by Brann—sometimes in N.S.B.'s presence. The record is replete with evidence of Brann's history and pattern of violence towards Guimaraes in the two years preceding her flight to Brazil with N.S.B., sometimes in the presence of N.S.B.—family violence admitted to by Brann and found by the Brazilian courts to require that Brann have supervised visitation with N.S.B.

Not only did the Harris County District Court ignore the voluminous evidence in the record of family violence and also of admitted pathological consumption of pornography by Brann in issuing possession and custody orders concerning N.S.B., it ignored and violated the mandatory requirements of Texas law (1) that it "shall consider the commission of family violence . . . in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator" and (2) that it "may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that . . . there is a history or pattern or committing family violence during the two years preceding the date of the filing of the suit" unless it "finds that awarding the parent access to the child would not endanger the child's physical health or emotional welfare and would be in the best interest of the child, and . . . renders a possession order that is

designed to protect the safety and well-being of the child and any other person who has been a victim of family violence committed by the parent . . . .” *See id.*

The custody orders of the Harris County District Court blatantly violate the foregoing provisions of the Texas Family Code. And by affirming the exclusive right of the Harris County District Court to make possession and custody orders in this case, this Court likewise affirmatively countenances the numerous violations of Texas law and of the governing principle of the Hague Convention and of the UCCJEA by these orders, in disregard of the fundamental human right of children and of their parents who have been victims of family violence and of Guimaraes’s constitutional right to due process..

In stark contrast to the rulings of the Harris County District Court and of this Court, the rulings of the Brazilian courts directly and fully comply with all these requirements. The panel opinion in this case contravenes each of them.

E. Comity

As stated above, I agree up to a point with the panel’s analysis of comity. I agree with the panel opinion’s statement that “Courts considering whether to extend comity to foreign Hague Convention judgments [should] ‘look[] closely at the merits of the foreign court’s decision in determining whether comity could properly be extended to its judgment.’” Slip Op. at 22 (quoting *Asvesta,* 580 F.3d at 1011). However, when that is done in this case, the panel’s conclusion that the “grave risk”

or "intolerable situation" requirement in Article 13 does *not* support the Brazilian courts' judgment that N.S.B. not be returned to the United States is unsupportable and clearly contrary to the plain meaning and intent of the Hague Convention.

Moreover, the two cases discussed at length in the opinion as supporting the panel's refusal to grant comity to the Brazilian courts' judgments, *Diorinou* and *Asvesta*, are factually inapposite. *See Diorinou*, 237 F.3d at 143–45 (reluctantly granting comity to Greek court's determination under Hague Convention not to order return of petitioner's children to New York based on Greek court's determination that father was not exercising custody rights at time motion initially took children to Greece, finding Greek court's interpretation of "grave risk" exception to be "dubious" because its use of that exception "appear[ed] to involve little more than an assessment of the children's best interest" rather than "extreme circumstances"); *Asvesta*, 580 F.3d at 1015–21 (refusing to extend comity to Greek court's refusal to order child be returned to United States where court failed to determine child's "habitual residence" before considering Convention exception, court's resolution of issue of father's consent to child's removal from United States was "completely unsupported" by record, and court had misapplied "grave risk" exception by considering nothing more than best interest of child in determining that "the child's separation from his motion at a young age would be more traumatic than his separation from his father").

I would hold that Guimaraes satisfied the Hague Convention requirements that a parent found by a foreign court to have wrongfully abducted a child under Article 3 of the Convention must establish an exception to the requirement that a wrongfully abducted child be returned to the country of origin to avoid a petition for search and seizure of the child under the Convention. I would hold that Guimaraes established by a preponderance of the evidence that N.S.B. was well-settled in Brazil, as required to establish the exception provided by Article 12 of the Convention, and that she proved by clear and convincing evidence that his return to the United States would expose him to a "grave risk" of physical or psychological harm or otherwise place him in an "intolerable situation," as required to establish the exception under Article 13 of the Convention.

I would hold that exclusive jurisdiction over custody and possession of N.S.B. is vested in the Brazilian courts and that the Harris County District Court has no jurisdiction over the custody of N.S.B. or over related matters, including the right of Guimaraes to refuge, which was properly decided by the Brazilian courts. Accordingly, I would accord comity to the judgments of the Brazilian courts in accordance with the terms of the Hague Convention, ICARA, and the UCCJEA.

IV. Conclusion

I would vacate the judgment of the Harris County District Court in the case on appeal insofar as it addresses matters affecting custody of N.S.B. and the legitimacy

of Guimaraes's seeking refuge in Brazil for N.S.B.'s and her own safety and welfare, I would void the orders made by the Harris County District Court with respect to the custody of N.S.B., and I would enter judgment dismissing the underlying case with respect to these matters for lack of subject-matter jurisdiction.

Because of the national and international repercussions of the opinion of this Court in this case, and because I believe it sets an erroneous precedent for future cases in this area of the law, I conclude that the case fully satisfies the requirements for en banc reconsideration set out in Texas Rule of Appellate Procedure 41.2(c). *See* TEX. R. APP. P. 41.2(c) ("En banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration."). Accordingly, I respectfully dissent from denial of en banc reconsideration.

Evelyn V. Keyes
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Lloyd.

En Banc Court consists of Chief Justice Radack and Justices Jennings, Keyes, Higley, Brown, and Lloyd.

Justice Keyes, dissenting from denial of en banc reconsideration.

Justices Bland, Massengale, and Caughey not participating.