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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-17022

D.C. No. 4:20-cv-00246-RM

[Filed: August 31, 2021]

BOGDAN RADU	)
	)
Petitioner - Appellee,	)
	)
v.	)
	)
PERSEPHONE JOHNSON SHON	)
	)
Respondent - Appellant.	)
	)

OPINION

Appeal from the United States District Court
for the District of Arizona, Tucson
Rosemary Marquez, District Judge, Presiding

Argued and Submitted July 1, 2021
San Francisco, California

Before: MURGUIA, R. NELSON and FORREST, Circuit Judges

App. 2

Opinion by Judge R. Nelson

R. NELSON, Circuit Judge:

Persephone Johnson Shon left her husband in Germany and removed her two minor children to Arizona, where they have resided for the last two years. The Hague Convention of the Civil Aspects of International Child Abduction provides for the prompt return of abducted children so that the country of habitual residence may resolve custody disputes. The district court found the repatriation of the minor children to Germany posed a grave risk of psychological harm if in the father's custody. To alleviate that risk, the district court ordered that the children be transferred back to Germany in Shon's custody until a German court made a custody determination. While the district court's order is permissible under the Convention, we vacate and remand for the district court to reasonably ensure compliance with its alternative remedy in Germany.

I

Bodgan Radu, a dual citizen of Romania and the United States, married Shon, a United States citizen, in 2011 in California. The couple has two minor children, O.S.R. born in 2013 in the United States and M.S.R. born in 2016 in Germany. The couple initially lived and worked in the United States. In December 2015, Radu traveled to Germany for a contractor job with the U.S. State Department. In March 2016, Shon moved to Germany along with O.S.R. and M.S.R. Shon, Radu, O.S.R., and M.S.R. lived together in Germany in

an apartment leased from Inge Frick-Wilden. Shon was a "full-time mom" while living with Radu in Germany.

Shon alleges that Radu abused her and the children after they moved to Germany. According to Shon, Radu constantly yelled and screamed at her about the messy apartment, put her down, and called her profanities. Shon did not trust Radu's parenting because "when he would rage and get angry and mean . . . [h]e couldn't control himself." Shon provided examples of Radu's rage and anger. In June 2016, Shon unknowingly gave O.S.R. sour milk to drink. In response, Radu allegedly slammed his hand on the table, threatened Shon, and accused her of trying to poison their son. Janet Johnson, Shon's mother, witnessed the sour-milk incident and testified that Radu "exploded all over [Shon] about being a terrible mother." In October 2017, Shon tripped on a stool and spilled broccoli across the floor. Radu allegedly screamed, yelled, and called O.S.R. "bad names, calling him stupid for leaving the stool out" while O.S.R. was "cowering." In March 2018, while Shon was handling bath time for the children, Radu allegedly flung the bathroom door open and slapped O.S.R. across the face. Finally, during a potty-training incident, while Shon was teaching M.S.R., Radu allegedly was "slamming against the door" and yelling for Shon to get M.S.R. to stop crying. Throughout these events, Shon never contacted law enforcement or sought a protective order or other legal remedy while living with Radu. However, she testified that she "was terrified of [Radu]" and "feared retaliation"—that is, he would hurt her or the children.

In March 2019, after Radu allegedly sexually assaulted Shon, she decided that she was not going to stay with Radu. On June 10, 2019, Shon flew one way to Arizona with both O.S.R. and M.S.R. Since Shon's departure, she and the children have resided in Arizona where she enrolled the children in school. Shon later filed for a divorce in Arizona. Shon has obtained counseling from Sherri Mikels-Romero, a licensed psychotherapist, approximately forty times. According to Mikels-Romero, Shon exhibited symptoms of posttraumatic stress disorder.

On June 8, 2020, Radu filed a Verified Petition for Return of Children to Germany ("Petition") pursuant to the Convention[1] and the International Child Abduction Remedies Act ("ICARA"), Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 22 U.S.C. § 9001 *et seq.*), which implements the Convention. Before filing, Radu contacted various local and national authorities to obtain the return of his children. This included filing a report with the Tucson, Arizona Police Department, contacting the children's school in Tucson, and filing a formal Convention application with Germany. The district court held an evidentiary hearing over three non-consecutive days on the merits of the Petition.

The district court granted Radu's Petition, ordering Shon to return O.S.R. and M.S.R. to Germany. *Radu v. Shon*, No. CV-20-00246-TUC-RM, 2020 WL 5576742, at *1 (D. Ariz. Sept. 17, 2020). The district court carefully

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[1] We use Convention to refer to the Hague Convention on the Civil Aspects of International Child Abduction (Convention), Oct. 25, 1980, T.I.A.S. No. 11670.

considered what type of remedy would safely allow the children to return to Germany. To "mitigate th[e] risk of psychological harm" to the children, the district court ordered an alternative remedy that "Shon shall retain temporary custody and care of the children until a custody determination can be made by a German court of competent jurisdiction." *Id.* at *3–4.

The district court made several findings. First, the district court found and Shon conceded that "Shon's removal of the children to the United States, and retention of them therein, was wrongful within the meaning of Article 3 of the Convention." *Id.* at *1. Second, the district court found that Article 12—"if less than one year has elapsed from the date of the wrongful removal or retention and the commencement of the proceedings" the children shall be returned—applied absent an exception. *Id.* at *2. However, the district court found an Article 13(b) exception applied because " the children would be at grave risk of psychological harm if returned to Germany in the custody of Radu." *Id.* at *3. The district court found the "evidence presented at the evidentiary hearing—including the testimony from Shon, Frick, and Johnson, as well as from Radu himself—supports a finding that Radu behaved in ways that could be characterized as psychologically or emotionally abusive." *Id.* At the hearing, Radu testified: "Probably in the heat of the passion, I may have called them [names] a couple of times . . . . So I do regret it, looking in perspective right now. Maybe I should have used a different tone [of] voice or a different type of -- better approach in managing my children."

The district court found the "evidence [] insufficient to show that O.S.R. and M.S.R. would be at grave risk of physical harm if returned to Germany" and there was "no evidence of any sexual abuse of the children." *Id.* The district court offered to "hold a further hearing upon request concerning the logistics of the children's return." *Id.* Apparently, neither party requested a hearing. Shon appealed and the district court stayed its order pending resolution of this appeal.

II

"The Hague Convention is a multilateral international treaty on parental kidnapping" in force between the United States and Germany. *Holder v. Holder* (*Holder I*), 305 F.3d 854, 859 (9th Cir. 2002). "Federal district courts have jurisdiction over actions arising under the Hague Convention pursuant to 22 U.S.C. § 9003." *Flores Castro v. Hernandez Renteria*, 971 F.3d 882, 886 (9th Cir. 2020). We have jurisdiction under 28 U.S.C. § 1291. *Id.* We review for abuse of discretion a district court's decision to grant or deny a petition for return following an Article 13(b) finding of grave risk of harm. *See* Convention Art. 18 ("The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."); *see also Lozano v. Montoya Alvarez*, 572 U.S. 1, 20 (2014) (Alito, J., concurring); *Baran v. Beaty*, 526 F.3d 1340, 1349 (11th Cir. 2008). "We review the district court's factual determinations for clear error, and the district court's application of the Convention to those facts *de novo*." *Flores Castro*, 971 F.3d at 886.

III

The main objective of the Convention and ICARA, its implementing statute, is "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Convention Art. 1. The aim is to "*prevent* parents from wrongfully taking children across national borders in order to shop for a friendly forum in which to litigate custody." *Gaudin v. Remis*, 415 F.3d 1028, 1036 (9th Cir. 2005). "Underlying this aim is the premise that the Convention should deprive parties of any tactical advantages gained by absconding with a child to a more favorable forum." *Holder v. Holder* (*Holder II*), 392 F.3d 1009, 1013 (9th Cir. 2004); *see also Papakosmas v. Papakosmas*, 483 F.3d 617, 621 (9th Cir. 2007). The central question is thus "*whether* a child should be returned to a country for custody proceedings and not *what* the outcome of those proceedings should be." *Holder II*, 392 F.3d at 1013.

A

We briefly recount the procedure for Convention petitions. The "return remedy" is the Convention's "central operating feature." *Abbott v. Abbott*, 560 U.S. 1, 9 (2010). "To that end, the Convention ordinarily requires the prompt return of a child wrongfully removed or retained away from the country in which she habitually resides." *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020) (citing Convention Art. 12). However, return is not required if the "abductor can establish one of the Convention's narrow affirmative defenses."

Gaudin, 415 F.3d at 1034–35; *see* 22 U.S.C. § 9003(e)(2). Article 12, Article 13, and Article 20 provide affirmative defenses or exceptions to the return of the child to her habitual residence. "Importantly, a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory. The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (1986).

Most relevant here is Article 13(b), which gives courts discretion not to return the children if "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." Convention Art. 13(b); *see Gaudin*, 415 F.3d at 1034–35. "By its terms, Article 13 does not require a court to refuse return of the child upon the demonstration of one of the article's defenses." *Asvesta v. Petroutsas*, 580 F.3d 1000, 1004 (9th Cir. 2009). The Convention and ICARA "dictate that custody must be determined by the home jurisdiction"—in this case, Germany—"unless the existence of a 'grave risk' truly renders that impossible." *Gaudin*, 415 F.3d at 1036. If a court decides that the record supports an Article 13(b) defense, it "must proceed to consider whether that risk can be minimized or eliminated through some alternative remedy." *Id.* at 1037.[2]

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[2] An alternative remedy is a judicial construct not found in the text of the Convention nor ICARA. *See Danaipour v. McLarey*, 286 F.3d 1, 21 (1st Cir. 2002) (citing P.R. Beaumont & P.E. McEleavy, *The*

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Our controlling precedent on alternative remedies is set forth in *Gaudin*. 415 F.3d 1028. "[B]efore denying the return of a child because of a grave risk of harm, a court must consider alternative remedies that would allow both the return of the children to their home country and their protection from harm." *Id.* at 1035 (internal quotation marks and citation omitted). We explained that the "question is simply whether any reasonable remedy can be forged that will permit the children to be returned to their home jurisdiction for a custody determination while avoiding the 'grave risk of psychological harm' that would result from living with" the petitioning parent. *Id.* at 1036 (citation omitted). We noted a few guidelines for determining whether a grave risk of harm may be mitigated through an alternative remedy: (1) the district court must consider the "effect of any possible remedies in light of circumstances as they exist in the present" meaning "whether a grave risk of harm *now* exists, and if so, whether that risk can be minimized through an

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Hague Convention on International Child Abduction 156–59 & n. 183 (1999)). We note that other courts have used different terms to describe an alternative remedy; "undertaking" appears to be the more common term employed. *See Simcox v. Simcox*, 511 F.3d 594, 605 (6th Cir. 2007) (defining "undertakings" as "enforceable conditions of return designed to mitigate the risk of harm occasioned by the child's repatriation") ; *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000) (explaining that the "undertakings approach allows courts to conduct an evaluation of the placement options and legal safeguards in the country of habitual residence to preserve the child's safety while the courts of that country have the opportunity to determine custody of the children within the physical boundaries of their jurisdiction").

alternative remedy" and (2) the district court must not be influenced by or accord weight to any existing custody proceedings. *Id.* at 1036–37.

If a district court makes an Article 13(b) grave-risk-of-harm finding—as the district court did below—the alternative remedy must significantly reduce, if not eliminate, the grave risk of harm to the children. *See Saada v. Golan*, 930 F.3d 533, 541 (2d Cir. 2019) ("The District Court must determine whether there exist alternative ameliorative measures that are either enforceable by the District Court or, if not directly enforceable, are supported by other sufficient guarantees of performance."). To that end, district courts need to determine whether and how the alternative remedy is likely to be performed. *See Walsh*, 221 F.3d at 219 ("A potential grave risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficient guarantees of performance of those undertakings.").

An alternative remedy evaluation in the context of an Article 13(b) finding must consider whether the return remedy is more likely than not to reduce the short-term risk of harm accompanying repatriation, thus protecting the child's psychological safety. While we do not impose rigid requirements, a district court's evidence-gathering cannot weigh matters or apply measures treading on the ultimate custody determination—*e.g.*, whether the children are better off with one parent or another. *Gaudin*, 415 F.3d at 1036. Nor should the alternative remedy incorporate any long-term considerations or conditions that conflict with the Convention and ICARA. *See* 22 U.S.C.

§ 9001(b)(4) (providing that the Convention and ICARA "empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims").

The children's interests, not the parents' preference or inconvenience, are paramount to evaluating whether an alternative remedy mitigates the grave risk of harm.[3] Appropriate considerations include the enforceability of the alternative remedy in the foreign jurisdiction based on the availability of legal measures to mitigate the child's risk of harm, reliability of testimony indicating compliance with any court orders or legal measures, as well as history of the parent's relationship, cooperation, and interpersonal communications. *See Saada*, 930 F.3d at 541–42. Any supportive reinforcements that may be necessary should reflect these considerations. Accordingly, the district court may solicit any promises, commitments, or other assurances to facilitate repatriation, which may involve directing parents to arrange for legal measures in the foreign jurisdiction—the children's habitual residence. *See id.*; *Danaipour*, 286 F.3d at 15. Indeed, the district court may need to review foreign law to evaluate the reach of that foreign court's authority in issuing legal measures or other relief in support of the alternative remedy.

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[3] However, a district court may factor in whether, for example, returning to the children's place of habitual residence would put the safety of the abducting parent at grave risk, and therefore calibrate the alternative remedy. *See Abbott*, 560 U.S. at 22.

Radu discusses German Code of Civil Procedure § 328 for its standards on enforcing foreign judgments. An analysis of Germany's pertinent civil laws, and other aspects of its legal apparatus (processes, procedures, and so forth) may inform whether the district court should direct the parties to obtain protective measures abroad or confirm whether domestic orders suffice. But given its limited authority abroad and potential comity concerns, the district court should not make the order of return with an alternative remedy contingent on the entry of an order by the children's country of habitual residence. *See Danaipour*, 286 F.3d at 23.

The district court may also solicit supplementary evidence, and in particular testimony, from the parents on these or related issues to determine the nature of supportive reinforcements. In rare circumstances, oral commitments from one parent to obey court orders may be enough.[4] Voluntary commitments or agreements—those without third-party intervention—are acceptable depending on the parties' pattern of behavior and the severity of risk of harm to the children (which must be low).

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[4] Radu testified that he would follow the district court's order. It is difficult to assess whether such testimony is enough to sustain the alternative remedy without additional facts. Notably, there is no restraining order, criminal adjudication, or other court judgment indicating either Shon or Radu poses a risk to the children requiring law enforcement. This may suggest an increased likelihood of performance and therefore reduced need for multiple supportive reinforcements.

The district court should also, if needed, contact the United States Department of State Office of Children's Issues to coordinate legal safeguards or otherwise procure assistance from the foreign jurisdiction to address or resolve any issues animating the Article 13(b) grave risk of harm finding. *See* Convention Art. 7 (listing measures available through Central Authorities).[5] Logistical arrangements such as financing the return of the children or securing housing or temporary placement should not undermine the alternative remedy. The options are extensive, but this framework provides the guideposts for navigating the provisions of the Convention and ICARA and creating a reasonable remedy for a short-term period. The district court may also consider activity in the children's habitual residence, including criminal proceedings, if it could significantly interfere with implementing the supportive reinforcements and otherwise reduce the likelihood of performance.[6] Supportive reinforcements generally should be limited in scope and thus not extremely burdensome to either party to avoid litigation over the merits of custody

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[5] Central Authorities, such as the Department of State's Office of Children's Issues, are empowered to engage in several activities including "to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child." Convention Art. 7(h).

[6] Radu wrote that there are "pending police dockets" in Germany related to the "disappearance of [his] children." Whether further inquiry is appropriate, particularly where it poses obstacles to advancing the alternative remedy, is for the district court to determine.

issues. Resolving the parameters of safe repatriation of the children is paramount.

IV

With this governing framework outlined, we turn to the merits of the district court's order to return the children. On appeal, Radu does not properly challenge the district court's finding that his children would face a grave risk of psychological harm if returned to Germany, even though the facts here do seem to be a borderline case whether an Article 13(b) finding is warranted. *See Gaudin*, 415 F.3d at 1037 ("[B]ecause the Hague Convention provides only a provisional, short-term remedy in order to permit long-term custody proceedings to take place in the home jurisdiction, the grave-risk inquiry should be concerned only with the degree of harm that could occur in the immediate future."). The focus of our inquiry here, however, is the alternative remedy based on the district court's findings. We vacate and remand the alternative remedy order since the record does not adequately support whether the order of the children's return in Shon's custody has a high likelihood of performance through supportive reinforcements.

A

Shon argues that where an Article 13(b) finding is made, the petitioning parent (here, Radu) bears the burden of "adduc[ing] any evidence on the enforceability of American alternative remedies in Germany." We decline to allocate a burden of proof on

the reasonableness of an alternative remedy.[7] Congress is capable of assigning burdens of proof and has already done so under ICARA. *See* 22 U.S.C. § 9003(e)(2). We need not add judicial constraints absent from ICARA or the Convention. To be sure, the reasonableness of the remedy originates with the district court having authority to request any information from the parties. The district court is in the best position to assess a parent's willingness to respect court orders and craft the alternative remedy accordingly.

Our framework enables a district court to craft the remedy with enough flexibility to account for the likely idiosyncratic nature of the parties' relationship without mandating a new evidentiary burden. On appeal, Shon alleged concerns about her "immigration status" impacting her ability to live in Germany with the children or "work in Germany to financially support herself and the children." At a minimum, practical considerations should be substantiated by the party asserting them as that furthers efficient resolution and discourages potential dilatory conduct.

Shon also argues that the alternative remedy "is overbroad and exceeds the scope of the lower court's authority" because it requires her to move to Germany, "orders the children to remain" in her custody, and "implicitly requires [her] to file a custody case in

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[7] *But see Acosta v. Acosta*, 725 F.3d 868, 877 (8th Cir. 2013) ("As the petitioner proffering the undertaking, [petitioner] bears the burden of proof.") (citation omitted); *Simcox*, 511 F.3d at 611 ("[T]he burden for establishing the appropriateness and efficacy of any proposed undertakings rests with the petitioner.").

Germany and the German court to act on it." The Convention, however, presumes relocation of the children to facilitate repatriation. *See Abbott*, 560 U.S. at 20 ("Ordering a return remedy does not alter the existing allocation of custody rights, but does allow the courts of the home country to decide what is in the child's best interests.") (internal citation omitted). If relocation of the abducting parent (or a responsible family member) can help alleviate any grave risk of harm from repatriation of the kids, the district court retains that discretion.

Because Shon wrongfully removed the children, as she conceded, the district court in no way exceeded its authority to mandate the children's return to Germany accompanied by Shon. But in the context of an Article 13(b) finding, the district court needed a fuller record to have sufficient guarantees that the alternative remedy will be enforced in Germany. As stated above, there are multiple resources the district court may engage, including assistance via the U.S. Department of State, to fulfill the Convention's presumptive goal of the speedy return of the children. That Germany is a treaty partner with the United States already informs baseline expectations. *Id.* ("International law serves a high purpose when it underwrites the determination by nations to rely upon their domestic courts to enforce just laws by legitimate and fair proceedings."). We must respect that another treaty partner—a contracting State to the Convention—is well-equipped with the proper legal mechanisms and internal processes and procedures to support alternative remedies and otherwise fulfill treaty obligations.

We recognize that abuse exists on a spectrum depending on the form, frequency, and other features. *See Simcox*, 511 F.3d at 605; *Blondin v. Dubois*, 238 F.3d 153, 162 (2d Cir. 2001). But an Article 13(b) grave risk of psychological harm finding does not automatically terminate further investigation into a reasonable alternative remedy. In fact, there is longstanding practice among our foreign counterparts, *see Abbott*, 560 U.S. at 16–17, to order return of the children despite objections by the abducting parent in situations of physical or psychological harm or alternatively consider remedies to mitigate a grave risk of harm upon repatriation.[8] The framework detailed

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[8] *See* Oberlandesgericht Dresden [OLG] [Higher Regional Court] Jan. 21, 2002, 10 UF 753/01 (Ger.); *see also RS v. BS* [2005] NZFC 61 at [37] (N.Z.) (concluding that "it is not sufficient for a respondent to make allegations of domestic violence and/or sexual abuse or even to satisfy the Court that such claims can be substantiated" and that "[i]n addition to the Court being satisfied of such matters it must also be satisfied that the U.S. justice system would not be able to deal with the stated allegations in a way that placed due consideration upon the best interests of the child"); *Re: 'H' Children* [2003] EWCA (Civ) 355 [37] (Eng.) (resolving "mechanics of the return" of the mother with the children to include "set[ting] aside" prior court order "giving sole parental rights to the father" and establishing "[s]ome clear understanding between the father and mother as to how and in what circumstances the father should see the children prior to any decision by the Belgian court" and "[i]f it can be arranged, either a hearing before the Belgian Court . . . to take over control of the future of these children as soon as possible after their return"); *C v. B* [2005] EWHC (Fam) 2988 [62] (Eng.) (concluding that the "proper solution . . . is for the court to order return so that the Australian court can reconsider the position . . . of the mother" who raised concerns about her mental health and other welfare considerations if the court ordered return).

above accommodates the fact-intensive nature that undergirds the fashioning of an alternative remedy upon an Article 13(b) finding and affords the district court the latitude to tailor it in light of more troubling factual scenarios.

V

Resolving international child abduction is at the forefront of the Convention. We are not blind to the emotional consequences, disruptions to livelihoods, and changes in routine that arise in physically moving children across international borders when a grave risk of psychological harm looms. But alternative remedies are consistent with the Convention's goal to accomplish children's repatriation while also protecting them from harm. There are multiple routes the district court may take to support an alternative remedy that satisfies the reasonableness standard—a likelihood of performance advanced through supportive reinforcements. The district court can be assisted by the U.S. Department of State, especially if foreign cooperation and protective measures are needed.

Consistent with the goals of the Convention, this litigation should conclude as quickly as possible. The district court shall expedite consideration of the case. Any subsequent appeal shall be assigned to this panel and either party may move for an expedited briefing schedule on appeal.

VACATED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-20-00246-TUC-RM

[Filed: September 17, 2020]

Bogdan Radu,	)
	)
Petitioner,	)
	)
v.	)
	)
Persephone Johnson Shon,	)
	)
Respondent.	)
	)

ORDER

Pending before the Court is Petitioner Bogdan Radu's ("Radu") Verified Petition for Return of Children to Germany ("Petition") (Doc. 1), brought pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") and its implementing legislation, the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 9001, *et seq*. (formerly 42 U.S.C. § 11601, *et seq*.). Respondent Persephone Johnson Shon ("Shon") filed an Answer to the Petition (Doc. 12) on July 23, 2020. The Court took the matter under advisement following an

evidentiary hearing held on July 29, 2020 and August 26-27, 2020, during which the Court received exhibits into evidence and heard the testimony of Radu, Shon, Inge Frick-Wilden ("Frick"), Janet Johnson ("Johnson"), and Sherri Mikels-Romero. (Docs. 15, 22-25.) For the following reasons, the Petition will be granted.

I. Background[1]

Radu and Shon were married in 2011 in the United States and are the parents of two minor children, O.S.R., who was born in 2013 in the United States, and M.S.R., who was born in 2016 in Germany. In December 2015, Radu moved from the United States to Germany; Shon followed him to Germany in March 2016. From 2016 to 2019, Radu, Shon, and their two minor children lived in an apartment in Germany that they leased from landlords Inge and Hans Frick. The children were enrolled in school in Germany.

On June 10, 2019, Shon took O.S.R. and M.S.R. from Germany to the United States. Since that date, Shon and the children have resided at Shon's parents' house in Tucson, Arizona. On August 10, 2019, Shon sent Radu a message stating that the children were enrolled in school in Arizona. On September 9, 2019, she filed a petition for dissolution of marriage and a motion for temporary custody of O.S.R. and M.S.R. in Pima County Superior Court case number D20192814; service has not been accomplished in that case. On

[1] The facts discussed in this Order are drawn from unopposed portions of the parties' pleadings as well as the evidence and testimony presented at the evidentiary hearing.

June 8, 2020, Radu filed the Petition in the above-captioned action.

II. Discussion

In an action under the Convention for the return of a child, the petitioner has the burden of establishing 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. § 9003(e)(1)(A).[2] Under Article 3 of the Convention, the removal or retention of a child is wrongful if "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." Shon concedes that, when she removed the children from Germany and brought them to the United States, Germany was the children's "state of habitual

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[2] Shon argues, as an initial matter, that the Convention does not apply because Radu left Germany for Romania on or about November 19, 2019. (Doc. 12 ¶ 12.) The Court finds that the evidence sufficiently shows that Radu's visit to Romania was temporary and that travel restrictions caused by the COVID-19 pandemic contributed to the delay in his return to Germany. *See Gaudin v. Remis,* 379 F.3d 631, 636-37 (9th Cir. 2004) ("*Gaudin II*") (holding that domicile—which requires the intent to remain in a jurisdiction—is the appropriate measure of whether a petitioner has moved permanently to a new jurisdiction for purposes of the Convention). The Court also notes that Shon's position on this issue is not supported by the statute she cites (*see* Doc. 12 ¶ 12 (citing 22 U.S.C. § 9003(f)), and it is not clear to the Court whether the Convention continues to apply when a petitioner moves to a different country. *See Gaudin v. Remis,* 282 F.3d 1178, 1183 (9th Cir. 2002) ("*Gaudin I*") ("We need not resolve the broad question of whether, or under what circumstances, a child should be returned to a petitioner's new, post-abduction residence.").

residence" within the meaning of the Convention; she further concedes that, under German law, she and Radu had joint rights to custody and control of the children. (Doc. 1 ¶¶ 2, 7; Doc. 12 ¶¶ 2, 7.) The Court finds that Shon's removal of the children to the United States, and retention of them therein, was wrongful within the meaning of Article 3 of the Convention.

Article 12 of the Convention provides that, if less than one year has elapsed from the date of the wrongful removal or retention and the commencement of the proceedings, the Court "shall order the return of the child forthwith," unless an exception applies. ICARA similarly provides that "[c]hildren who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies." 22 U.S.C. § 9001(a)(4). At the evidentiary hearing, the Court found that the one-year period began to run on June 10, 2019, when Shon took the children from Germany to the United States, and that Radu filed the pending Petition within one year of that date.[3] Accordingly, the Court must order the return of the children unless an exception applies.

Shon raises two affirmative defenses under Article 13 of the Convention. First, she argues that Radu

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[3] Article 12 of the Convention further provides that, even if the proceedings have been commenced more than one year after the wrongful removal or retention, the Court must order the return of a child "unless it is demonstrated that the child is now settled in its new environment." The well-settled defense under Article 12 is not available to Shon because Radu filed the Petition within one year of the wrongful removal.

consented to or acquiesced in the removal of O.S.R. and M.S.R. from Germany. (Doc. 12 ¶ 14.) Pursuant to Article 13(a) of the Convention, the Court is not required to order the return of a child if the respondent establishes that the petitioner "consented to or subsequently acquiesced in the removal or retention" of the child. The respondent bears the burden of establishing this defense by a preponderance of the evidence. *See* 22 U.S.C. § 9003(e)(2)(B). The evidence and testimony presented at the evidentiary hearing shows that, although Radu negotiated with Shon regarding custody of the children and may have consented to Shon taking the children on a temporary visit to the United States, Radu did not consent to Shon permanently moving the children to the United States. Shon has not established a defense under Article 13(a) of the Convention.

Second, Shon argues that returning O.S.R. and M.S.R. to Germany would place the children at grave risk of physical or psychological harm. (Doc. 12 ¶ 14.) Under Article 13(b) of the Convention, the Court is not required to order the return of a child if the respondent establishes 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." The respondent bears the burden of establishing the grave-risk defense by clear and convincing evidence. *See* 22 U.S.C. § 9003(e)(2)(A).

The Convention does not extend to custody determinations; it is designed only "to decide *which country* should make the custody determination." *Gaudin I,* 282 F.3d at 1183 (emphasis in original).

Accordingly, in evaluating the grave-harm exception, the Court may not speculate on where the child would be happiest, *Gaudin v. Remis,* 415 F.3d 1028, 1035 (9th Cir. 2005) ("*Gaudin III*"), or who is a better parent, *Blondin v. Dubois,* 189 F.3d 240, 246 (2d Cir. 1999) ("*Blondin I*"). The Court may decline to return a child under the grave-risk exception only if the respondent establishes that "the child would suffer serious abuse that is a great deal more than minimal" if returned. *Gaudin III,* 415 F.3d at 1035 (internal quotation marks and citation omitted). The focus is not on whether a living situation would be "capable of causing grave psychological harm over the full course of a child's development" but rather whether it is "likely to do so during the period necessary to obtain a custody determination." *Id.* at 1037. In addition, the Court must consider "whether any reasonable remedy can be forged that will permit the children to be returned to their home jurisdiction for a custody determination" while avoiding grave risk of harm. *Id.* at 1036.

The evidence presented at the evidentiary hearing—including the testimony from Shon, Frick, and Johnson, as well as from Radu himself—supports a finding that Radu behaved in ways that could be characterized as psychologically or emotionally abusive.[4] The record

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[4] At the evidentiary hearing, the Court allowed Shon to present evidence that O.S.R. and M.S.R. are well settled in Tucson, relying upon *Blondin v. Dubois,* 238 F.3d 153, 164 (2d Cir. 2001) ("*Blondin II*"), which held that "the fact that a child is settled may form part of a broader analysis [under Article 13(b)] of whether repatriation will create a grave risk of harm." The record contains evidence that O.S.R. and M.S.R. have been attending the International School in Tucson and going to services at a Lutheran church, and that

indicates that he had an explosive temper and that, when angry, he yelled at Shon and the children and also used inappropriate, degrading, and/or derogatory language. Shon, Frick, and Johnson each testified to being scared of Radu.

The evidence of physical abuse of the children is less significant than the evidence of emotional or psychological abuse. Shon testified that Radu banged his fists on tables and/or doors when angry, and that he threw objects, including a chair. She also testified that he once slapped O.S.R. There is no evidence that Radu hit either of the minor children in a manner that required medical attention, nor is there any evidence that Shon or anyone else sought a protective order or filed any police reports concerning Radu's behavior toward the children. There is no evidence of any sexual abuse of the children.

The evidence is insufficient to show that O.S.R. and M.S.R. would be at grave risk of physical harm if returned to Germany. However, the Court finds that the children would be at grave risk of psychological harm if returned to Germany in the custody of Radu.

O.S.R. has had four counseling sessions with a Tucson therapist since July 2020. Although the children's lives will, unfortunately, be disrupted by their return to Germany, it was Shon's wrongful removal of them from Germany tbat is ultimately responsible for any disruption that occurs as a result of their return. *See Cuellar v. Joyce,* 596 F.3d 505, 511 (9th Cir. 2010). Because "it is the *abduction* that causes the pangs of subsequent return," the Ninth Circuit has held that "[t]he fact that a child has grown accustomed to her new home is never a valid concern under the grave risk exception." *Id.* (internal quotation marks omitted; emphasis in original).

To mitigate this risk of psychological harm, the Court will order that O.S.R. and M.S.R. be returned to Germany in the custody of Shon until a custody determination can be made by a German court of competent jurisdiction. *See Gaudin III,* 415 F.3d at 1037 (suggesting that district court could require children to be returned in the care of the abducting parent); *cf. Blondin I,* 189 F.3d at 249 (2d Cir. 1999) (suggesting return of children in third party's care). The Court will hold a further hearing upon request concerning the logistics of the children's return.

III. Expenses

Radu argues that he is entitled to reimbursement of his reasonable costs and fees related to this matter. (Doc. 1 ¶ 11.) Article 26 of the Convention provides that, upon ordering the return of a child, the Court "may, where appropriate, direct the person who removed or retained the child . . . to pay necessary expenses incurred by or on behalf of the applicant . . . ." Similarly, ICARA provides that a court ordering the return of a child under the Convention "shall order the respondent to pay necessary expenses incurred by the petitioner . . . unless the respondent establishes that such order would be clearly inappropriate." 22 U.S.C. § 9007(b)(3). The Court will take Radu's request for reimbursement of expenses under advisement pending additional briefing.

IT IS ORDERED that the Petition (Doc. 1) is **granted**. Respondent Persephone Johnson Shon shall return the minor children O.S.R. and M.S.R. to Germany. To prevent a grave risk of psychological harm, Shon shall retain temporary custody and care of

the children until a custody determination can be made by a German court of competent jurisdiction.

IT IS FURTHER ORDERED that travel arrangements for returning the children to Germany shall be made within **thirty (30) days** of the date this Order is filed.

IT IS FURTHER ORDERED that, within **twenty-one (21) days** of the date this Order is filed, Petitioner Bogdan Radu may file a motion for an award of expenses which addresses the propriety of such an award and lists the specific expenses for which Radu is seeking reimbursement. If a motion is filed, Respondent may file a response within **fourteen (14) days** of the filing of the motion. No reply will be permitted absent further Order.

Dated this 16th day of September, 2020.

/s/ Rosemary Márquez
Honorable Rosemary Márquez
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-20-00246-TUC-RM

[Filed: April 7, 2021]

Bogdan Radu,	)
	)
Petitioner,	)
	)
v.	)
	)
Persephone Johnson Shon,	)
	)
Respondent.	)
	)

ORDER

On September 17, 2020, this Court granted Petitioner Bogdan Radu's Verified Petition for Return of Children to Germany and ordered the return of minors O.S.R. and M.S.R. to Germany in the temporary custody of Respondent Persephone Johnson Shon. (Doc. 26.) In an Order dated September 28, 2020, the Court directed the Clerk's Office to release the passports of O.S.R. and M.S.R. to Respondent upon request. (Doc. 28.) On November 17, 2020, the Court stayed its September 17, 2020 Order pending the resolution of Respondent's appeal of that Order. (Doc. 44.) The Court

has confirmed that the Clerk of Court still has possession of the passports and European Union identification cards of O.S.R. and M.S.R.

IT IS ORDERED that the Court's September 28, 2020 Order (Doc. 28) is **stayed** pending resolution of Respondent's appeal. The Clerk of Court shall retain possession of the passports and European Union identification cards of O.S.R. and M.S.R. pending resolution of Respondent's appeal and further Order of this Court.

Dated this 6th day of April, 2021.

/s/ Rosemary Márquez
Honorable Rosemary Márquez
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-20-00246-TUC-RM

[Filed: March 19, 2021]

Bogdan Radu,	)
	)
Petitioner,	)
	)
v.	)
	)
Persephone Johnson Shon,	)
	)
Respondent.	)
	)

ORDER

Pending before the Court is Petitioner Bogdan Radu's Motion for Attorney's Fees and Costs. (Doc. 30.) Respondent Persephone Johnson Shon filed a Response (Doc. 39), and Petitioner filed a Reply (Doc. 42). For the following reasons, the Motion for Attorney's Fees will be denied.

I. Background

On June 8, 2020, Petitioner filed a Verified Petition for Return of Children to Germany ("Petition") (Doc. 1), brought pursuant to the Hague Convention on the Civil

Aspects of International Child Abduction ("the Convention") and its implementing legislation, the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001, *et seq*. (formerly 42 U.S.C. § 11601, *et seq*.). Respondent filed an Answer to the Petition. (Doc. 12.) The Court held an evidentiary hearing on July 29, 2020 and August 26-27, 2020. (Docs. 15, 21, 22.) On September 17, 2020, the Court granted the Petition but ordered the return of minor children O.S.R. and M.S.R. to Germany in the temporary custody of Respondent in order to mitigate a grave risk of psychological harm to the children. (Doc. 26.) In finding a grave risk of psychological harm, the Court noted that the evidence presented at the evidentiary hearing supports a finding that Petitioner had an "explosive temper" and "behaved in ways that could be characterized as psychologically or emotionally abusive," including yelling at Respondent and the children and using "inappropriate, degrading, and/or derogatory language." (*Id.* at 5.) The Court also discussed evidence that Petitioner once slapped O.S.R. and that he threw objects and banged his fists on tables and/or doors when angry. (*Id.*)

Respondent appealed the Court's September 17, 2020 Order (Doc. 36), and this Court subsequently stayed the Order pending resolution of Respondent's appeal (Doc. 41).[1]

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[1] The filing of a notice of appeal from a decision on the merits does not divest a district court of jurisdiction to decide a motion for attorney's fees. *Masalosalo v. Stonewall Ins. Co.,* 718 F.2d 955, 957 (9th Cir. 1983).

II. Motion for Attorney's Fees and Costs

Petitioner requests attorney's fees totaling $32,578.36, including $20,400.00 for attorney Ann Haralambie, $6,515.00 for attorney Lisa McNorton, and $5,663.36 (€4,840.48) for attorney Monica Hansen. (Doc. 30.) In addition, Petitioner requests $58.50 in non-taxable costs for the expense incurred in obtaining an official translation of German documents submitted as part of this case. (*Id.*) Petitioner argues that he is entitled to an award of fees and costs pursuant to 22 U.S.C. § 9007; that the requested award is reasonable; and that it is appropriate to award fees for the work of pro bono attorney McNorton and foreign counsel Hansen. (Doc. 31.) In support of his requested fee award, Petitioner submits the retainer agreements of attorneys Haralambie and Hansen (*id.* at 12-14, 16-18), billing statements and affidavits from attorneys Haralambie, McNorton, and Hansen (*id.* at 20-33, 35-38, 40-50, 53-55, 69-71, 73-74), and the resume of attorney Haralambie (*id.* at 57-67).

Respondent asks the Court to deny or drastically reduce the requested award. (Doc. 39.) Respondent argues that the requested award is "clearly inappropriate, unjust and inequitable" because (1) the award would interfere with Respondent's ability to care for O.S.R. and M.S.R., given her limited financial means; (2) Petitioner has provided little to no financial support for O.S.R. and M.S.R. in years; and (3) the risk of future abuse from Petitioner "would be magnified should Respondent become financially indebted" to him. (Doc. 39 at 1-2, 6-14.) Respondent also argues that there is "some question" as to whether Petitioner truly

prevailed in this action (*id.* at 15), and that the claimed fees are "startlingly high considering the relatively straightforward nature of this proceeding and how quickly it was resolved" (*id.* at 2; *see also id.* at 14-15, 23-24).

A. Applicable Law

Article 26 of the Convention provides that, upon ordering the return of a child, the Court "may, where appropriate, direct the person who removed or retained the child . . . to pay necessary expenses incurred by or on behalf of the applicant . . . ." Similarly, ICARA provides that a court ordering the return of a child under the Convention "shall order the respondent to pay necessary expenses incurred by the petitioner, including . . . legal fees . . . unless the respondent establishes that such order would be clearly inappropriate." 22 U.S.C. § 9007(b)(3). The fact that a petitioner's lawyers provided services pro bono does not make a fee award inappropriate. *Cuellar v. Joyce,* 603 F.3d 1142, 1143 (9th Cir. 2010). Courts are divided on whether a petitioner may recover fees incurred by a foreign attorney who was not an attorney of record in the case at hand. *Compare Freier v. Freier,* 985 F. Supp. 710, 713-14 (E.D. Mich. 1997) (declining to award fees and costs incurred by a foreign attorney who did not represent the petitioner in the action but wrote a letter concerning Israeli law which was submitted to the court), *with Distler v. Distler,* 26 F. Supp. 2d 723, 728 (D.N.J. 1998) (awarding fees to foreign attorney who advised the petitioner on her rights under the Convention, helped her retain counsel

in the United States, prepared a legal opinion, and assembled affidavits for potential use in the case).

In determining whether an award of fees would be "clearly inappropriate," courts consider the reasonableness of the respondent's basis for removing the children. *See Ozaltin v. Ozaltin,* 708 F.3d 355, 375-78 (2d Cir. 2013) (finding award should be reduced because respondent had a "reasonable basis for thinking that she could remove the children"); *Mendoza v. Silva,* 987 F. Supp. 2d 910, 916-17 (N.D. Iowa 2014) (denying fee award in part because case was "very close" on the merits). Courts also consider the financial circumstances of the respondent and whether an award of fees would interfere with the respondent's ability to care for the minor children. *See Whallon v. Lynn,* 356 F.3d 138, 140 (1st Cir. 2004) ("preserving the ability of a respondent to care for her children is an important factor to consider"); *Rydder v. Rydder,* 49 F.3d 369, 373-74 (8th Cir. 1995) (reducing award of fees and costs in light of the respondent's "straitened financial circumstances"); *see also Mendoza,* 987 F. Supp. 2d at 917 (declining to award attorney's fees where an award would interfere with the respondent's ability to provide support to children given the respondent's financial circumstances); *Rehder v. Rehder,* No. C14-1242RAJ, 2015 WL 4624030, at *4 (W.D. Wa. Aug. 3, 2015) (same); *Lyon v. Moreland-Lyon,* No. 12-2176-JTM, 2012 WL 5384558, at *2-3 (D. Kan. Nov. 1, 2012) (same). Furthermore, courts consider whether the prevailing party has financially neglected the children or been physical or mentally abusive. *See Silverman v. Silverman,* No. 00-2274 JRT, 2004 WL 2066778, at *4 (D. Minn. Aug. 26, 2004). Courts in the District of

Arizona have declined to award attorneys' fees based on the limited financial means of the respondent and the abuse and financial neglect of the petitioner. *See von Meer v. Hoselton,* No. CV-18-00542-PHX-JJT (D. Ariz. Mar. 14, 2019) (declining to award fees given the respondent's limited financial means); *Aguilera v. De Lara,* No. CV-14-01209-PHX-DGC (D. Ariz. Aug. 25, 2014) (declining to award fees given the respondent's limited financial means, the petitioner's occasional violent behavior, and the petitioner's failure to provide regular financial support to minor child).

B. Discussion

The Court finds that an award of attorney's fees under 22 U.S.C. § 9007(b)(3) would be "clearly inappropriate" for several reasons. As an initial matter, the Court notes that, although Petitioner is the prevailing patty in this action, his success was only partial. Respondent prevailed in establishing by clear and convincing evidence that, due to Petitioner's history of abusive behavior, returning O.S.R. and M.S.R. to Germany in Petitioner's custody would pose a grave risk of psychological harm under Article 13(b) of the Convention; the Court granted the Petition and ordered the children's return only because the grave risk of psychological harm could be remedied by requiring that the children be returned in the temporary custody of Respondent. Petitioner is eligible for a fee award because the Court ordered the children's return, but the propriety of a large award is questionable given that Respondent prevailed on an important issue in this case. *See Ozaltin,* 708 F.3d 355 at 375-78; *Mendoza,* 987 F. Supp. 2d at 916-17.

More importantly, an award of fees could interfere with Respondent's ability to care for O.S.R. and M.S.R., given her limited financial means. Respondent is the primary caregiver of the children, and she avers that she earns only $14.30 per hour and has been restricted in her capacity to work due to the COVID-19 pandemic. (Doc. 39-1 at 2.) Furthermore, she expects to incur thousands of dollars in expenses returning the children to Germany,[2] and she does not expect to be able to obtain employment in that country, given the lapse of her German resident status and her prior inability to find employment there. (*Id.* at 3-4.) Petitioner argues in reply that a respondent's limited financial means should not warrant a denial of fees (Doc. 42 at 2), but his argument is belayed by courts' routine consideration of a respondent's financial circumstances in evaluating the propriety of a fee award under 22 U.S.C. § 9007. *See, e.g., Rydder,* 49 F.3d at 373-74; *Lyon,* 2012 WL 5384558, at *2-3; *see also Silverman,* 2004 WL 2066778, at *4 ("The ability to care for dependents is well-established as an important consideration in awards of fees and costs in Hague Convention cases.").[3]

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[2] Petitioner urges the Court to disregard Respondent's averments concerning the anticipated costs of returning the children to Germany because those costs were not addressed at the evidentiary hearing held on July 29, 2020 and August 26-27, 2020. (Doc. 42 at 3-4.) However, Petitioner cites no legal authority to support his position that it is improper for this Court to consider averments made in a sworn affidavit.

[3] Petitioner also argues that that there is no reason to believe that an award of fees would impair Respondent's ability to care for O.S.R. and M.S.R., given Respondent's parents' history of

Petitioner's financial neglect of the minor children further warrants the denial of a fee award. *See, e.g., Silverman,* 2004 WL 2066778, at *4. Respondent avers that Petitioner has not provided financial support in four years. (Doc. 39-1 at 3.) Petitioner urges the Court to disregard that averment because child support payments were not addressed at the evidentiary hearing held on July 29, 2020 and August 26-27, 2020. (Doc. 42 at 3-4.) However, Petitioner cites no legal authority indicating that it is improper for this Court to consider the averments in Respondent's sworn affidavit. Petitioner could have submitted a controverting affidavit but failed to do so.

Finally, Petitioner's history of psychologically and emotionally abusive behavior also supports the Court's conclusion that an award of fees would be clearly inappropriate. The legal costs in this case could have been reduced or avoided entirely if not for the enmity between Petitioner and Respondent, and Petitioner bears the greatest responsibility for that enmity given his history of abusive behavior. *See Silverman,* 2004 WL 2066778, at *4 (considering which party is primarily responsible for the parties' enmity where that enmity was "in large part responsible for the legal costs" in the case) (internal quotation marks omitted).

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financially assisting her and the children. (Doc. 42 at 4.) But Petitioner does not cite any case which analyzed the financial resources of a respondent's family members, versus the financial resources of the respondent herself, in determining whether a fee award was clearly inappropriate under 22 U.S.C. § 9007. Furthermore, there is insufficient record evidence concerning whether Respondent's parents will be willing and able to continue to assist her and the children financially in the future.

Because the Court finds that an award of fees would be clearly inappropriate in this case, it does not reach the parties' arguments concerning the reasonableness of Petitioner's requested fee award or the propriety of awarding fees for the work of pro bono and/or foreign counsel.

IT IS ORDERED that Petitioner's Motion for Attorney's Fees and Costs (Doc. 30) is **denied.**

Dated this 19th day of March, 2021.

/s/ Rosemary Márquez
Honorable Rosemary Márquez
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-20-00246-TUC-RM

[Filed: November 17, 2020]

Bogdan Radu,	)
	)
Petitioner,	)
	)
v.	)
	)
Persephone Johnson Shon,	)
	)
Respondent.	)
	)

ORDER

In an Order filed on September 17, 2020, this Court granted Petitioner Bogdan Radu's Petition for Return of Children to Germany pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention"), and ordered that minor children O.S.R. and M.S.R. be returned to Germany in the custody of Respondent Persephone Shon until a custody determination can be made by a German court of competent jurisdiction. (Doc. 26.) Respondent filed an appeal of the Court's Order in the Ninth Circuit Court of Appeals. (Doc. 36.) Briefing and

calendaring of the appeal has been expedited. *See Radu v. Shon*, No. 20-17022 (9th Cir. Nov. 6, 2020).

Pending before the Court is Respondent Persephone Johnson Shon's Motion to Stay Return Order Pending Appeal. (Doc. 40.)[1] Respondent asks that the Court's September 17, 2020 Order be stayed pending resolution of her appeal, arguing that she has shown a likelihood of success on the merits of the appeal, that she and the minor children will suffer irreparable injury absent a stay, that there will be no substantial injury to Petitioner by the issuance of a short stay until the expedited appeal is concluded, and that the public interest will be served by issuance of a stay. (*Id.* at 7-12.) The Court issued a temporary stay pending its resolution of the Motion. (Doc. 41.) Thereafter, Petitioner filed a Response in opposition (Doc. 42), and Respondent filed a Reply (Doc. 43). Petitioner argues that there is no legal or factual basis for Respondent's appeal of this Court's September 17, 2020 Order, that Respondent's wrongful actions should not be further prolonged, that Respondent made no good-faith effort to comply with the Court's Order, and that Respondent requested a stay of the Order after the deadline for making travel arrangements for the return of the children had expired. (Doc. 42 at 4-5.) Petitioner argues that, if the Court does grant a stay, it should order Respondent to post a bond to cover an attorney's fee award, his reasonably anticipated costs on appeal, and the cost of securing the children's return. (*Id.* at 5.) In

[1] Also pending is Petitioner Bogdan Radu's Motion for Attorney's Fees and Costs (Doc. 30), which will be resolved separately.

Reply, Respondent argues that a bond is not permitted under Article 22 of the Hague Convention. (Doc. 43.)

In considering whether to stay a return order in a Hague Convention case, courts consider the traditional stay factors: "(1) whether the stay applicant has made a strong showing that [s]he is likely to succeed on the merits; (2) whether the applicant will be irreparably inured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Chafin v. Chafin*, 586 U.S. 165, 179 (2013).With respect to the first factor, Respondent's Motion to Stay raises concerns regarding the logistics of returning O.S.R. and M.S.R. to Germany, given the COVID-19 pandemic and the lapse of Respondent's German resident permit. (Doc. 40 at 3-4 n. 2-3.) However, the Court's September 17, 2020 Order invited the parties to request a further hearing concerning the logistics of the children's return, and Respondent failed to do so. Respondent also did not request reconsideration of the Court's September 17, 2020 Order on the basis of any of her factual concerns regarding the logistics of the children's return. Furthermore, Respondent filed her Motion to Stay after expiration of the Court's deadline for making travel arrangements for the children's return, she has not explained her delay, and she has not shown that she made any good-faith efforts to comply with the Court's Order before requesting a stay.

Despite these concerns, the Court finds that Respondent has sufficiently shown a likelihood of success on the merits of her appeal. *See Leiva-Perez v. Holder*, 640 F.3d 962, 966-68 (9th Cir. 2011) (per

curiam) ("to justify a stay," a litigant "need not demonstrate that it is more likely than not that [she] will win on the merits" but instead need show only that "she has a substantial case for relief on the merits"). The Court's September 17, 2020 Order found a grave risk of psychological harm under Article 13(b) of the Hague Convention but concluded that the risk could be avoided by requiring that O.S.R. and M.S.R. be returned to Germany in Respondent's custody. Case law offers only minimal guidance regarding how to properly craft remedies allowing for a child's return under the Hague Convention while avoiding a grave risk of harm under Article 13(b). Given the scant case law, the Court finds that the first factor—the likelihood of Respondent's success on the merits of her appeal—weighs in favor of a stay.

The second factor also weighs in favor of a stay, given the potential harm to Respondent and the children of being required to return to Germany while the expedited appeal is pending. With respect to the fourth factor, the public interest favors the prompt return of wrongfully removed children, but it also favors safeguarding the well-being of children. Although O.S.R. and M.S.R. were wrongfully removed from Germany, they are currently in a safe, stable living situation in Tucson, Arizona; their return to Germany during the pendency of Respondent's appeal would disrupt that living situation and interrupt their school year. *See Chafin*, 568 U.S. at 178 ("shuttling children back and forth . . . across international borders may be detrimental to those children.") Accordingly, the Court finds that the fourth factor weighs in favor of a stay. In considering the third

factor, the Court does not take lightly the injury to Petitioner of further delay in seeing his children; however, that injury does not outweigh the other factors in light of the fact that Respondent's appeal has been expedited. The Court will grant Respondent's Motion to Stay.

The Court rejects Petitioner's request that Respondent be ordered to post a bond. Article 22 of the Hague Convention states: "No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention." Courts have recognized that Article 22 prohibits imposition of bonds to secure the payment of costs and expenses, including attorney's fees, in Hague Convention cases. *See, e.g.*, *Patrick v. Rivera-Lopez*, 708 F.3d 15, 23 (1st Cir. 2013); *Souratgar v. Fair*, No. 12 CIV. 7797(PKC), 2013 WL 705923, at *1 (S.D.N.Y. Feb. 22, 2013).

Accordingly,

IT IS ORDERED that Respondent's Motion to Stay Return Order Pending Appeal (Doc. 40) is **granted**. The Court's September 17, 2020 Order (Doc. 26) is **stayed** pending resolution of Respondent's appeal.

Dated this 16th day of November, 2020.

/s/ Rosemary Márquez
Honorable Rosemary Márquez
United States District Judge