

THE INTERNATIONAL LAWYER

A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW AND PRACTICE

FALL 2001 • VOLUME 35 • NUMBER 3

FOREIGN LAW YEAR IN REVIEW: 2000

Introduction	Roger P. Alford
African Law	
Canadian Law	
European Law	
Mexican Law	
Russian Law	

ARTICLES

Article 13(b) of the Hague Convention Treaty: Does It Create a Loophole for Parental Alienation Syndrome—an Insidious Abduction?	Barbara Bevando Sobal William M. Hilton
The Justification for Humanitarian Intervention: Will the Continent Matter?	Yvonne C. Lodico
Out of Gas In Turkmenistan: The Stalled Commercial Law Reform of a Post-Soviet State	Brian J. O'Shea
Agreements between an Electronic Marketplace and Its Members	Michael R. Geroe

COMMENT

Protecting and Enforcing Intellectual Property Rights in Developing Countries	Ronald J. T. Corbett
--	----------------------

SECTION RECOMMENDATION AND REPORT

Council of Europe's Criminal Law Convention on Corruption	
---	--

PUBLISHED IN COOPERATION WITH SMU SCHOOL OF LAW

Article 13(b) of the Hague Convention Treaty: Does It Create a Loophole for Parental Alienation Syndrome—an Insidious Abduction?

BARBARA BEVANDO SOBAL* AND WILLIAM M. HILTON**

And ye, fathers, provoke not your children to wrath!

Medea, like Circe, was also said to be the daughter of Hecate. She was a princess and a powerful witch referred to as the “wise one.” She was the niece of Circe and a priestess of Hecate. According to Pliny, her magic controlled the sun, moon and stars. Her most popular myth was one in which she aided Jason in obtaining the Golden Fleece so that he could win a kingdom in Greece that was rightfully his but had been taken over by his Uncle Pelias. The King of Colchis, Medea’s father, possessed the Golden Fleece. When Jason and his band of Argonauts appeared, Medea fell in love with Jason and decided to help him in his quest. By preparing an ointment that made Jason and his men invulnerable for a day, and bewitching the serpent who guarded the Golden Fleece, Medea made it possible for Jason to accomplish his task. Medea, Jason and the Argonauts then fled to Greece. Jason and Medea were later married and had two children. Years later, Jason wished to marry Creusa, princess of Corinth; so, vengeful Medea sent her a poisoned robe as a gift. When Creusa put on the robe she immediately burst into flames and burned to death. Then Medea killed the children she had by Jason, set fire to the

*Barbara Bevando Sobal, attorney at law, New York, New York, bbs@bsobal.com; NYU School of Law, J.D.; listed, International Solicitors, USA; fellow, International Academy of Matrimonial Lawyers, at www.iaml.org. Ms. Sobal gives special thanks to Lady Catherine Meyer for all of her cooperation, tenacity and, most of all, her courage. So many abducted children and their families already have, and will, benefit from her cause. May she some day be reunited with the two sons that she so adores. Ms. Sobal gratefully acknowledges Werner U. Martens of München, Germany, fellow, International Academy of Matrimonial Lawyers, for his assistance in providing the German cases in their true form, which were subsequently translated into English. Many thanks also to Sheelagh Taylor, former Director, London European HQ, International Centre for Missing and Exploited Children (ICMEC), <http://icmec.missingkids.com/>, for all of her help, dedication and understanding of PAS, and the Hague Convention Treaty. Most importantly, Ms. Sobal wishes to express heartfelt sympathy to all of the children, parents, and families who have suffered psychologically and/or physically from child abductions and PAS. Your pain is the essence of this article.

**William M. Hilton, Esq., CFLS (certified family law specialist), Santa Clara, California; email: hilton34@hiltonhouse.com; fellow, International Academy of Matrimonial Lawyers, at www.iaml.org.

1. *Ephesians* 6:4 NT (Kings James).

palace, and fled to Athens where she married King Aegeus, the father of Theseus. Medea was made immortal by Hera and later became the wife of Achilles in Elysium, the afterworld of heroes.²

In ancient Greece and Rome, fathers automatically got custody, even if the fathers unilaterally divorced their wives. Children were the fathers' property, and a father could sell his child into slavery and even kill her. Whether a parent provokes his children to wrath or kills them as Medea did in the Greek tragedy and as fathers did in ancient Greece and Rome, the result is still the same: The children are destroyed.

As noted by Forensic Psychologist D. C. Rand,

Modern Medeas do not want to kill their children, but they do want revenge on their former wives or husbands—and they exact it by destroying the relationship between the other parent and the child. . . . The Medea syndrome has its beginnings in the failing marriage and separation, when parents sometimes lose sight of the fact that their children have separate needs [and] begin to think of the child as being an extension of the self. . . . A child may be used as an agent of revenge against the other parent . . . or the anger can lead to child-stealing.³

In today's disposable society in which even children are disposed of and replaced, the selfishness of parents' interest does not lie with the best interest of children. The trend is to abduct. The problem of abduction becomes generational; thus, this vicious cycle of abuse is perpetuated. In one case, a mother was abducted four times by her mother as a child. Now, the mother has abducted her baby. In another case, a father only abducted his now grown son. His daughter, now grown, is suffering post-traumatic stress and feels abandoned by her father because he seemed to have only wanted her brother.

I. Article 13(b)

If it were screenwriters drafting a script based on the history of Polanski's conviction and flight from punishment, incorporating the civil and criminal aspects of his actions, we would surely create a scenario where all the characters get their [just deserts] without regard to the protective safeguards of the Constitution. However, as jurists, we are bound by constitutional principles and must apply them evenhandedly, regardless of our personal opinions of any of the litigants.⁴

Article 13(b) of the Hague Convention Treaty on the Civil Aspects of International Child Abduction, adopted at the Hague on 25 October 1980 (Hague Convention Treaty), states in pertinent part,

But judicial or administrative authority may also refuse to order the return of the child if it finds that the child *objects to being returned and has obtained an age and degree of maturity* at which it is appropriate to take account of its views.

2. Euripides, *Medea* (431 B.C.), available at <http://classics.mit.edu/Euripides/medea.html>.

3. Deirdre Conway Rand, Ph.D., *The Spectrum of Parental Alienation Syndrome* (Part 1), 15 AMERICAN JOURNAL OF FORENSIC PSYCHOLOGY (1997), quoting JUDITH WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES* (1989), at www.fact.on.ca/Info/pas/rand02.htm, at 4.

4. *Doe v. Superior Court* (Cal. App. 2 Dist 1 Div 1990) 222 Cal. App. 3d 1406, 1411, 212 Cal. Rptr. 2d 474, 477 (1990).

In considering the circumstances referred to in this article, the judicial and administrative authority shall take into account the information relating to the social background of the child provided by the Central Authority or other confident authority of the child's habitual residence. [Emphasis added.]

Since the Hague Convention Treaty was promulgated on 25 October 1980, there has been conflict concerning the proper application of article 13(b). One school of thought is that because the Hague Convention Treaty has a specific section for exceptions to the general rule of return under article 12, the drafters of the Hague Convention Treaty expected that there would be occasions when under the exceptions, a child would not be returned. An alternate thought is that the drafters only included article 13(b) (and article 20) because without it the chances of having the Hague Convention Treaty accepted would have been diminished.

Case law since the inception of the Hague Convention Treaty reflects this dichotomy: (1) after piously stating that the Hague Convention Treaty does not go to the merits of the underlying custody action, some courts then proceed under the guise of article 13(b) to hold a best-interests hearing; (2) other courts have followed the expression of the Explanatory Report by E. Pérez-Vera, Hague Conference on Private International Law,⁵ in which great trust is given to the court of the child's habitual residence to do the right thing. While an article 13(b) finding can alert the court and show a need for protection of the children, it should not be used to create a loophole and defeat the purpose of the Hague Convention Treaty, which is to return the children to their habitual residence, where the bulk of all relevant evidence concerning their best interests can be found.

This basic fact is discussed in no. 34 of the Pérez-Vera report:

To conclude our consideration of the problems with which this paragraph deals, it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them—those of the child's habitual residence—are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.⁶

The key to the convention is evident in the following words:

The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them—those of the child's habitual residence—are in principle best placed to decide upon questions of custody and access.

5. Elisa Pérez-Vera, *Conclusions des travaux de la Conférence de La Haye de droit international privé* (Results of the work of the Hague Conference on private international law), vol. III (1980) [hereinafter Pérez-Vera Report].

6. *Id.*

II. Parental Alienation Syndrome⁷

A. CONCEPT OF PARENTAL ALIENATION SYNDROME

The concept of Parental Alienation Syndrome (PAS) is not without controversy. The general view under certain foreign courts is that it does not exist. However, a recent case, *Kilgore v. Boyd*,⁸ refutes that thinking by finding PAS to be scientifically reliable and states in pertinent part,

THE COURT: If I do have to apply a Frye test he has passed the Frye test . . . in my courtroom, which is the Circuit Court Courtroom in the Family Law division, based on the evidence and the argument before me. The evidence and the argument before me, the testimony and the CV of Dr. Gardner, together with an excerpt of his writings. There was also proffered an article from the Florida Bar Journal which . . . I placed some credibility in . . . I'm also impressed by the fact that Dr. Gardner is cited in the footnote in at least one of the cases, I believe it's *Schultz vs. Schultz*.⁹

. . . Furthermore, Dr. Gardner's argument [on why PAS is] not in the DSM-IV [is that] it's not in there yet because the DSM-IV hasn't been updated since 1994. Both of the examples cited, that is the fact that AIDS was widely discussed and treated and diagnosed before it was included in the DSM-IV as was Tourette's syndrome, [are] persuasive.

. . . The study by Dr. Gardner has been around since 1985, which is *fifteen years*.

. . . So based on the totality . . . I find that even though I might not have to have the test meet the Frye criteria that it does meet the Frye criteria . . .¹⁰

Frye v. United States,¹¹ a long-established case, states in pertinent part,

While the courts will go a long way in admitting expert testimony, deduced from a well-recognized scientific principle or discovery, the thing from which the deduction [was] made must be sufficiently established to have gained general acceptance in the particular field in which it belongs . . .

Accordingly, because a U.S. court found PAS to be scientifically reliable,¹² PAS can no longer be ignored.

PAS is a disorder that arises primarily in the context of child custody disputes. Its primary manifestation is a child's campaign of denigration against one parent, a campaign that has no justification.¹³ It results from the *combination* of the programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent. When true parental abuse and/or neglect is present, the child's animosity may be justified, and the PAS explanation for the child's hostility is not applicable.

7. RICHARD A. GARDNER, M.D., *THE PARENTAL ALIENATION SYNDROME*, 2D EDITION, at xxi-xxii (1998); see also www.rgardner.com.

8. *Kilgore v. Boyd*, Case No. 94-7573, Nov. 22, 2000.

9. *Schutz v. Schutz*, 522 So. 2d 874 (Fla. App. 1988).

10. *Boyd*, Case No. 94-7573, Nov. 22, 2000.

11. *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013, 1014 (1923).

12. See *Frye*, 293 F. 1013.

13. GARDNER, *supra* note 7.

B. SYMPTOMS OF PARENTAL ALIENATION SYNDROME¹⁴

The eight cardinal symptoms of PAS are

- a campaign of denigration;¹⁵
- weak, frivolous, and absurd rationalizations for the depreciation;¹⁶
- lack of ambivalence;¹⁷
- an independent-thinker phenomenon;¹⁸
- reflexive support of the alienating parent in the parental conflict;¹⁹
- absence of guilt over cruelty to and/or exploitation of the alienated parent;²⁰
- presence of borrowed scenarios; and²¹
- the spread of animosity to the extended family and friends of the alienated parent.²²

1. *A Campaign of Denigration*²³

Typically, a child is obsessed with hatred of a parent. This child will speak of the alienated parent with every vilification and profanity in her vocabulary without embarrassment or guilt. The denigration of the vilified parent often has the quality of a litany. After only minimal prompting by a lawyer, judge, probation officer, mental health professional, or other person involved in the litigation, the brain recording will be turned on, and a command performance is provided in which the targeted parent's defects are listed at length.

2. *Weak, Frivolous, and Absurd Rationalizations for the Depreciation*²⁴

Typically, a PAS child provides irrational and often ludicrous justifications for his alienation from the targeted parent. The child may justify the alienation with memories of minor altercations experienced in the relationship with the estranged parent—even years after they took place. These are usually trivial experiences that most children quickly forget. When a PAS child is asked to give more compelling reasons for his rejection, he is unable to provide them. Typically, the alienating parent will agree with the child that these professed reasons justify the ongoing animosity.

3. *Lack of Ambivalence*²⁵

Another symptom of PAS is complete lack of ambivalence. All human relationships are ambivalent, and parent-child relationships are no exception. But the concept of mixed feelings has no place in a PAS child's scheme of things. The victimized parent is all bad, and the indoctrinating parent is all good. Most children (normal ones as well as those with a

14. *Id.* at 76–109.

15. *Id.* at 77–86.

16. *Id.* at 86–94.

17. *Id.* at 94–96.

18. *Id.* at 96–99.

19. *Id.* at 99–100.

20. *Id.* at 100–01.

21. *Id.* at 101–07.

22. *Id.* at 107–09.

23. *Id.* at 77–86.

24. *Id.* at 86–94.

25. *Id.* at 94–96.

wide variety of psychiatric problems), when asked to list both good and bad things about each parent, will generally be able to do so. When a PAS child is asked to provide the same list, he will typically recite a long list of criticisms of the targeted parent but will not be able to think of one positive or redeeming personality trait. In contrast, the child will provide only positive and endearing qualities for the alienating parent and claim to be unable to think of even one dislikable trait. The vilified parent may have been deeply dedicated to the child's upbringing, and a strong bond may have been created over many years. Yet, it seems to evaporate almost overnight at the time of the onset of PAS. In contrast, the alienating parent, toward whom the child was previously ambivalent, becomes idealized and can do no wrong.

4. *An Independent-Thinker Phenomenon*²⁶

Many PAS children profoundly profess that their decision to reject targeted parents is their own. They deny any contribution from programming parents, who support this independence vociferously. In fact, alienators will typically proclaim that they want their children to visit and profess recognition of the importance of such involvement. Yet, the indoctrinators' acts indicate otherwise.

5. *Reflexive Support of the Alienating Parent in the Parental Conflict*²⁷

In family conferences in which children are seen together with both the alienating and alienated parents, the children reflexively take the position of the indoctrinating parents—sometimes even before the victimized parents have had the opportunity to present their side of the argument. Even the alienating parents may not present the argument as forcefully as the supporting children. Thus, PAS children may even refuse to accept evidence that is obvious proof of the vilified parents' position.

6. *Absence of Guilt over Cruelty to and/or Exploitation of the Alienated Parent*²⁸

A PAS child may exhibit guiltless disregard for the feelings of the victimized parent. There will be a complete absence of gratitude for gifts, support payments, and other manifestations of the vilified parent's continued involvement and affection.

7. *Presence of Borrowed Scenarios*²⁹

The presence of borrowed scenarios should clue examiners into the high probability that they are dealing with PAS. Not only is there a rehearsed quality to PAS children's litanies, but also one often hears phraseology that is not commonly used by children of that age. Many expressions are identical to those used by the indoctrinating parents. Certain parental terms and phrases become scripted into the children's litanies of denigration. Frequently, the children attribute particular statements to programming parents, thereby letting the cat out of the bag and confirming that particular phrases have been programmed.

8. *The Spread of Animosity to the Extended Family and Friends of the Alienated Parent*³⁰

The hatred of an alienated parent often extends to include that parent's complete extended family. Cousins, aunts, uncles, and grandparents—with whom the child previously

26. *Id.* at 96–99.

27. *Id.* at 99–100.

28. *Id.* at 100–01.

29. *Id.* at 101–07.

30. *Id.* at 107–09.

may have had loving relationships—are now viewed as similarly obnoxious. Grandparents who previously had a loving and tender relationship with the child find themselves suddenly and inexplicably rejected. The child has no guilt over such rejection, nor does the alienator. Greeting cards are not reciprocated. Presents sent to the child are refused, remain unopened, or are even destroyed (generally in the presence of the programming parent). When the denigrated parent's relatives call on the telephone, the child will respond with angry vilification or quickly hang up on the caller. (These responses are more likely to occur if the alienating parent is within hearing distance of the conversation.) With regard to the denigration of the relatives, the child is even less capable of providing justification for the animosity. The rage of a PAS child is often so great that he becomes completely oblivious to the privations he is causing himself. Again, the indoctrinating parent is typically unconcerned with the untoward psychological effects on the child of this rejection of the network of relatives who previously provided important psychological gratification.

C. PARENTAL ALIENATION SYNDROME AS A FORM OF CHILD ABUSE³¹

It is important to understand that a parent who inculcates PAS in a child is indeed perpetrating a form of emotional abuse in that such programming may not only produce lifelong alienation from a loving parent but also lifelong psychiatric disturbance in the child. Parents who systematically program a child into a state of ongoing denigration and rejection of a loving and devoted parent are exhibiting complete disregard of the alienated parent's role and the child's upbringing. Such an alienating parent is disrupting the psychological bond between the alienated parent and the child, that could, in the vast majority of cases, prove of great value to the child.³²

The term PAS refers *only* to situations in which the parental programming is combined with the child's own scenarios of disparagement of the vilified parent.³³ According to Dr. Gardner, children jump on the bandwagon of the parents with whom they have the stronger bond. These children are more threatened by non-custodial parents being delineated the custodians. However, the bond is pathological.³⁴ Because of a child's immaturity, she brings primitive thinking into the campaign with preposterous thinking by the child being somewhat supported by the custodial parent.³⁵

Furthermore, a child's love of the programmer has less to do with love than the child's fear of the programmer. The child has already lost one parent and fears losing the love of the programmer.³⁶ Consequently, the behavior of either one or both alienators, who purport to love this object of the war, may be seriously damaging to their child. The alienator may therefore overtly or covertly attempt to enlist the child on her side in any potential custody litigation. Enlisting the child, or co-opting the child, becomes all the more important since one of the factors to which the court gives great weight in a judicial determination of custody

31. *Id.* at xx.

32. *Id.*

33. *Id.* at xx.

34. Richard A. Gardner, M.D., "The Parental Alienation Syndrome: Diagnosis and Treatment," Lecture at the American Academy of Forensic Examiners, New York, New York (Oct. 30, 1999), at www.rgardner.com/pages/cv.lects.

35. *Id.*

36. *Id.*

is the child's preference.³⁷ Unfortunately, a child's stated preference becomes an important weapon in the arsenal of the competing parent.³⁸

1. *Severely Alienated Children*³⁹

Severely alienated children are the victims of the obsessed alienators' relentless campaign to destroy their relationships with targeted parents. These children may appear to others as normal, healthy children until the topic of their targeted parents comes up. Immediately, their demeanors change. Their friendly, pleasant expressions turn to anger and contempt. These are the children that Dr. Gardner describes in his definition of PAS.⁴⁰

2. *What Does a Severely Alienated Child Look Like?*⁴¹

A severely alienated child has a relentless hatred toward the targeted parent. He parrots the obsessed alienator. The child does not want to visit or spend any time with the targeted parent. Many of the child's beliefs are enmeshed with those of the alienator. The beliefs are delusional and frequently irrational.

A court does not intimidate a severely alienated child. Frequently, his reasons are not based on personal experiences with the targeted parent; rather, they reflect what he is told by the obsessed alienator. The child is not neutral in his feelings; he only feels hatred and is unable to see the good. He has no capacity to feel guilty about how he behaves toward the targeted parent or to forgive any past indiscretions.

He shares the obsessed alienator's cause. They work together to desecrate the hated parent. The child's obsessive hatred extends to the targeted parent's extended family without remorse.

3. *Three Types of Parental Alienation Syndrome*⁴²

PAS refers to the symptoms in a child. There are three types of PAS: mild, moderate, and severe. Alienators range from the mild to the moderate to the severe. There is no direct parallel between the efforts of the alienator and the success of the child's alienation. A severe alienator may only produce mild symptoms in the child because of the strong bonding that the targeted parent has established with the child. This is the best antidote to the development of PAS.

4. *The Obsessed Alienator*

An obsessed alienator is a parent with a cause: to align the child to his or her side and, together with the child, campaign to destroy the the child's relationship with the targeted

37. STANLEY S. CLAWAR & BYRNNE V. RIVLIN, *CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN*, at vii (1991).

38. *Id.* at viii.

39. DOUGLAS DARNALL, PH.D., *DIVORCE CASUALTIES: PROTECTING YOUR CHILDREN FROM PARENTAL ALIENATION*, at 33 (1998).

40. *Id.* at viii.

41. *Id.* at 13, 14.

42. RICHARD A. GARDNER, M.D., *THERAPEUTIC INTERVENTIONS FOR CHILDREN WITH PARENTAL ALIENATION SYNDROME*, at 423, 425 (2000); see also www.rgardner.com.

parent. For this campaign to work, the obsessed alienator enmeshes the child's personality and beliefs into her own.⁴³ This is a process that takes time but could also occur within a few days.⁴⁴

This is also a process that a child, especially a young one, is completely helpless to combat. It usually begins well before a divorce is final. The obsessed parent is angry or bitter or feels betrayed by the other parent. The initial reasons for the bitterness may be justified. The obsessed parent could have been verbally and physically abused, betrayed by an affair, or financially cheated. The problems occur when the feelings do not heal but instead become more intense due to the necessary continued relationship with the person she despises because of their common parenthood. Just having to see or talk to the other parent is a reminder of the past and triggers the hate. Though Clawar and Rivlin did not specifically discuss the obsessed alienator in their book, they found that five percent of the children in their study were programmed by similar parents to the point of no return, meaning that no interventions were found to be effective in deprogramming these children. These children were emotionally and physically lost to the targeted parents. These are the children that Dr. Gardner describes as victims of PAS.

There are no validated treatment protocols for either the obsessed alienator or the severely programmed child. Courts and mental health professionals are frequently powerless in helping either the obsessed or targeted parents or the children. The best hope for these children is early identification of the symptoms and prevention. Once the alienation becomes entrenched and the children become true believers in the obsessed parents' cause, the children are usually lost to the targeted parents for years to come.⁴⁵

D. INTERVENTION

In his latest book, Dr. Gardner describes successful interventions for the mild and moderate types of PAS.⁴⁶ According to Dr. Gardner,

The diagnosis of the PAS is determined by the symptomatology in the child, not the degree to which the alienator has tried to induce the disorder. There are many situations in which the attempts to program the child into the campaign of denigration have not been successful, even though the alienator has been relentless in the attempts to alienate the child. The most common reason for the lack of success in such situations is the strong, healthy bonding that the victimized parent has had with the child. This bonding has served as an antidote to the PAS poison.⁴⁷

... Inducing a PAS in a child is a form of emotional abuse. As is true for physical and sexual abuse, PAS symptomatology may be lifelong. The attenuation and even destruction of what was previously a good parent-child bonding may be permanent. They may not be able to resume a relationship after a hiatus of a few years. The attempts at rapprochement may be similar to that which occurs at an alumni meeting. A few minutes are spent reminiscing about the good old days, and then there may be little else to say to one another, because the individuals have gone down separate paths in life. The healthy bond between a parent and child needs

43. DARNALL, *supra* note 39, at 13, 14.

44. Interview with Richard A. Gardner, M.D. (Oct. 2000).

45. DARNALL, *supra* note 39, at 13, 14.

46. GARDNER, *THERAPEUTIC INTERVENTIONS*, *supra* note 42, at xx-xxi.

47. *Id.* at xx.