

The Hague
Abduction
Convention in an
Evolving World -
Safely Returning
Abducted Children



What is the Hague Abduction Convention?



Primary focus: returning children, who are under the age of 16, who have been wrongfully taken from one country to another

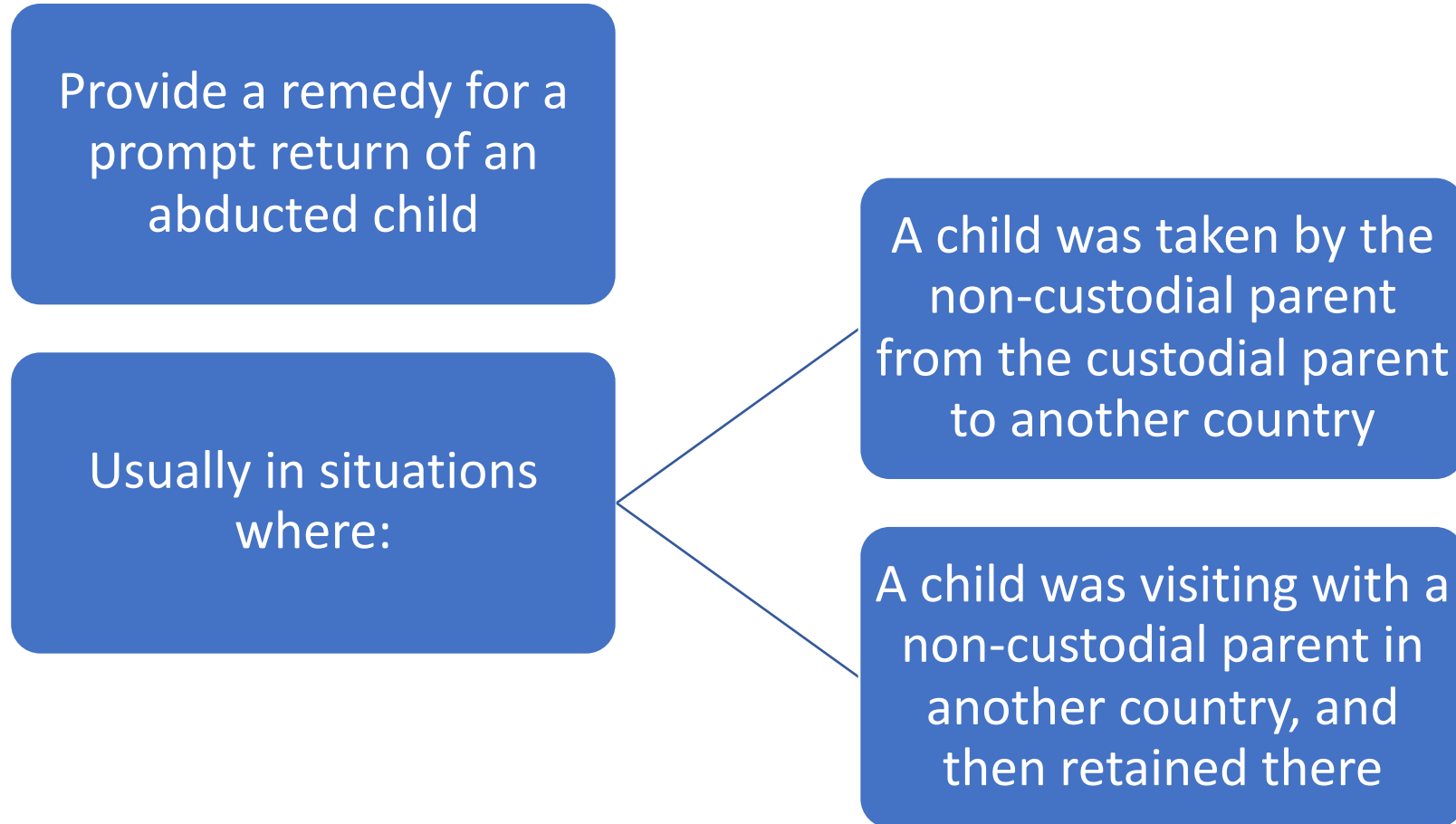


Secondary focus: ensure a parent's access to their child is respected

How does a Left Behind Parent Seek their Child's Return after being abducted to the U.S.?

- In U.S., file a lawsuit in state or federal court where the child is sitting after the abduction
- Prove that:
 - the child was removed from their habitual residence
 - the habitual residence is a Convention partner with the U.S.
 - LBP has (or would have) been actually exercising a “right of custody” that exists under the law of the habitual residence
- May access resources by filing paperwork (*i.e.*, an “application”) with the Central Authority

Original Intent of the Drafters



But ... Typical Case Statistics (2021)

- 75% of taking persons were mothers
- 88% of taking persons were the primary custodian or a joint-primary custodian
- More return applications are received by the USA than by any other government
- Average age of the child abducted was 6.7 years in 2021
- 23% of children judicially returned + 16% of children voluntarily returned (total: 39% of children returned)

Why are cases different than the original case envisioned by the Drafters?

Custody laws have changed since 1980

more fathers get custody

more parents share joint custody



Lack of uniformity among countries & lack of clarity on rules as to when a parent may relocate (legally) with their child

The Non-Custodial Parent & a Right of Custody

- Premise was that you do not return a child to a country when the parent in that country has no “right of custody”
- “Right of custody” is broadly defined by caselaw, however, and does not necessarily = being the residential custodian
- How can a non-custodial parent have a “right of custody”?
- *Abbott v. Abbott*, 560 U.S. 1 (2010)
- End result = custodial parents may abduct their children, but the child may nonetheless be returned, and, by default, go to the non-custodial parent

The Convention & Domestic Violence

- Many Abducting Parents argue that they abduct to flee an unsafe situation caused by abuse or domestic violence
- Article 13 (b): The Grave Risk of Harm Argument
- Broader than domestic violence
- But encompasses domestic violence



The Grave Risk of Harm Argument in the U.S.

- Clear and convincing burden of proof
- Risk *to the child*
- Could domestic violence to the Taking Parent be a risk?
- “expose the child to physical or psychological harm or otherwise place the child in an intolerable situation” *upon return*
- Return where? To a country [not a parent, not a particular city necessarily, but...]

What if the Taking Parent refuses to return?

Situations where the Taking Parent, usually the custodial parent, argues that removing the child from their custody creates the grave risk of psychological harm to the child

But, courts have concluded that it is generally not a grave risk of harm to return a child just because their custodial parent refuses to return

Discretion

Even if the court concludes that there is a grave risk of harm, it has the discretion to nonetheless return a child

Article 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.”

Article 13: “... the judicial or administrative authority of the requested State is not bound to order the return of the child if the person ... which opposes its return establishes that ...”

Lozano v. Montoya Alvarez, 572 U.S. 1 (2014); J. Alito Concurrence



Reaffirming Discretion in Situations of a Grave Risk: *Golan v. Saada*

- Son born June 2016 in Milan, Italy to Mother and Father
- In July 2018, Mother and Son travel to New York for a family wedding, and refuse to return
- Father files a Convention return case in federal court in EDNY
- Existing 2nd Circuit precedent required that, upon a finding of a grave risk, the court **must** examine whether there exist “ameliorative measures” to return the child nonetheless



An orange lifebuoy with white reflective stripes is floating on dark blue, rippling water. The lifebuoy is positioned in the center-left of the frame. The background is a dark blue, textured surface representing water.

Ameliorative Measures

- **What are “ameliorative measures”? [See HCCH Guide to Good Practice, para. 43, et. seq.] (aka “Protective Measures”)**
 - Existing services, assistance and support, including legal services in other country
 - Financial assistance, housing assistance in other country
 - Health services, shelters and other assistance or support for survivors of DV
 - Responses by police, functioning of criminal justice system
 - Voluntary undertakings (assuming that they are enforceable or supported by guarantees of performance)

Ameliorative Measures in *Golan v. Saada*

Original AM

- Father gives Mother \$30,000 before child is returned
- Agrees to stay away from Mother
- Agrees to only see child with Mother's consent

Updated AM after 1st remand

- Father gives Mother \$150,000 before child is returned
- Parents obtained a civil protective order in Italy that would be an enforceable court order

The Issue before the Supreme Court

Must courts consider these ameliorative measures after finding a grave risk?

Ms. Golan's Argument

- DV cases are intricate and complicated
- AMs are rarely effective at actually protecting the child upon return
- Examining AM opens up the case to be a full-blown custody trial
- There is already a high C&C burden to prove a grave risk exists


Mr. Saada's Argument

- Convention language requires looking at the child's exposure *upon return*, ergo, you have to consider AM
- There is sufficient overlap in evidence, so it won't open the case too widely
- There is a presumption to return children, and to trust sister Signatories, and examining AM lets the U.S. do that

Rule from *Golan v. Saada*

Adopting the U.S. Government's Approach

Courts *may* consider ameliorative measures if the court finds the child would be exposed to a grave risk of harm upon return




3 prongs courts must consider

Prioritize the child's safety

Do not make this into a custody case

Act expeditiously



2 circumstances when a court *should* explore ameliorative measures

If raised by the parties, or

If it is obviously suggested by the circumstances of the case
(e.g., localized epidemic)

Golan v. Saada

Remand

August 31, 2022 – return ordered again – AM were already considered, and should have been considered because they were obviously suggested by the circumstances



Since Additional Return Order

October 2022 – Ms. Golan passed away
Ms. Golan's sister is retaining the child

So... Ameliorative Measures.

What does this mean for a case going forward?

- When Respondents Answer, pleading a Grave Risk, savvy Petitioners are amending their Petition to assert alternative relief – if a grave risk is found, examine AM, and return the child (i.e., a party raises AM)
- Courts, even when no one mentions AM, have, at times, been including a statement in their opinions, at least referencing AM
- Circuits that previously always examined AM → will probably still do so
- Circuits that previously never examined AM → will probably start doing so

The Role of the Judicial Network

- Letter from Judge Mary Sheffield to Italian Network Judge (March 24, 2023)
 - The status of the case in Italy
 - The effect of a 01/25/23 Order in Milan declaring “the cessation” of the Italian matter due to Narkis Golan’s death
 - Whether BAS could return in the custody of his Father
 - Any legal implications to the Father’s ability to exercise custody over his son in Italy
 - If Father’s family could have custody if the Father is not permitted
 - If BAS would be placed in foster care, an orphanage or group home
 - Whether BAS still has a GAL

The Role of Central Authorities

- What is a Central Authority?
- *Radu v. Shon* and Central Authorities
 - Court independently contacted U.S. Department of State
 - DOS connected Court with German Central Authority
 - GCA referred Court to German Civil Code saying “matters related to children shall be handled in an expedited manner”
- Concerns raised by Ms. Shon
 - Ex parte, off the record
 - Inadmissible hearsay, relied on materially by court
 - Violates Ms. Shon’s constitutional due process rights

What have courts been doing since?



Braude v. Zeirler

Raised by a Party, Considered by Court,
concluded NOT sufficient to ameliorate the risk
upon return

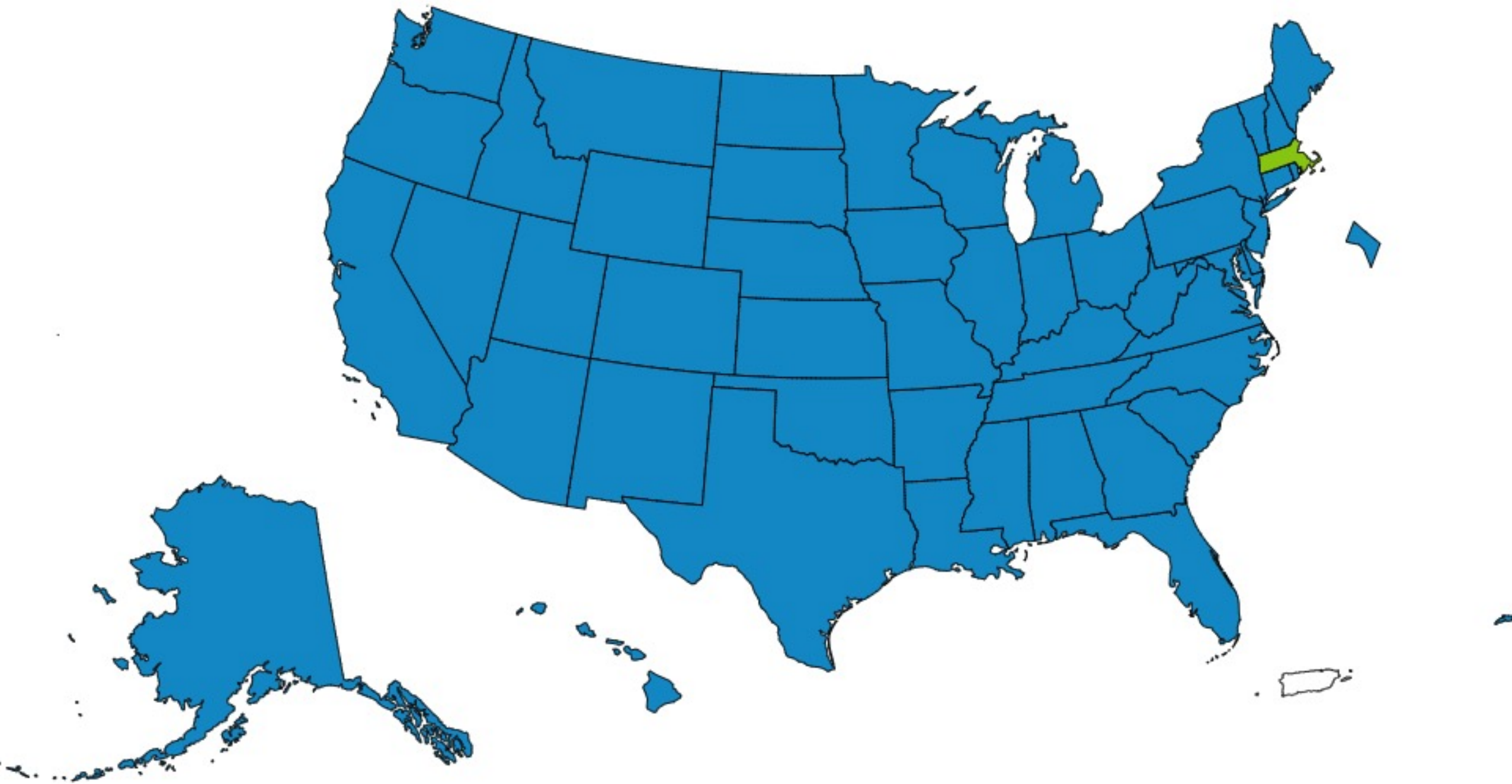


Johnson v. Johnson

Not Raised by a Party, Referenced by Court,
concluded that there exist none that would
ameliorate the risk upon return

But, ... what!?

- There may be a way to get around this grave risk issue in the first place
- The UCCJEA's escape clause
 - A custody order
 - Made in foreign country under factual circumstances in substantial conformity with jurisdictional standards of UCCJEA
 - U.S.-based parent was entitled to notice, but no notice was given in the foreign proceedings
 - The child-custody laws of the foreign country violates fundamental principles of human rights*





* Caveat

- Some states have expanded this very rigid human rights provision
- Ex. Connecticut
 - “... or unless such determination is repugnant to the public policy of this state.”
- Ex. Washington
 - “A court of this state need not apply this chapter if the law of a foreign country holds that apostasy, or a sincerely held religious belief or practice, or homosexuality are punishable by death, and a parent or child may be at demonstrable risk of being subject to such laws. For the purposes of this subsection, "apostasy" means the abandonment or renunciation of a religious or political belief.”

Example of UCCJEA

- Parents and Child live in Florence. Parents have separated.
- Mother accuses Father of violent behavior, and reports him to the police, where the investigation did not yield any charges.
- Mother removes the child to the U.S.
- Father learns of the child's removal. He can: (1) file a Convention case in the federal or state court where the Mother sits with the child, or (2) ...
 - Father goes to the family court in Florence, and gets an emergency order requiring the Mother to return the child to Florence, and placing the child in the Father's temporary custody

Registration of Italian Order

- Father brings Italian order to U.S. state court where child is sitting, registers it
- Mother argues that the order should not be enforced. Her only available arguments:
 - The Italian courts did not make the Order with proper jurisdiction as that is defined in the UCCJEA – NO
 - The Mother was required to receive notice, but no notice was given – NO
 - The Italian child custody laws violate fundamental principles of human rights – NO
- Registered, Enforced, as quickly as the next business day in the courts; law enforcement pickup order; child is on the next flight to Italy

The Purpose of these Laws

Stabilize the child

Resume the status quo

Do not let a parent seek out a new forum to get a better result (forum-shop)

Does not dictate where a custody case is brought – domestic/internal law determines that (for example, in the U.S., the UCCJEA)

Thank you

Melissa A. Kucinski

MKFL: International Family Law

Washington, D.C.

www.mkfamily.law



MKFL
INTERNATIONAL FAMILY LAW

