

THE HAGUE CONVENTION - AN INTERNATIONAL, AND IMPERFECT U.C.C.J.A.

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The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter "The Hague Convention") establishes, in theory, the "legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as securing the exercise of visitation rights."

The Hague Convention provides the mechanism for determining whether a child has been wrongfully removed, but any decision on the underlying question of custody is left to the appropriate judiciary of the child's home state. A Hague Court "... is empowered to determine the merits of an alleged abduction but not the merits of the underlying custody claims or issue." Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991). Additionally, the Meredith Court noted that "[c]ustody rights are determined by the law of the child's habitual residence." Id. at 1434. Unfortunately, however, the Court did not define "habitual residence" as it related to the Hague Convention.

Once the child has been removed/abducted from the jurisdiction, the Hague Convention may be invoked in one of two ways. The primary, and most common method, is for the party seeking the return of the child to contact the Central Authority of the country in which that party resides; i.e. if the child is abducted from the United States to Canada, the custodial parent residing in the United States would contact the Department of State who, in turn, would contact the "Central Authority" in Canada. It would be the obligation of the Central Authority in Canada to attempt to find an attorney to represent the custodial parent still in the United States.

Obviously, although the "preferred" method, this mechanism is time consuming and, because of the distances and the different time zones involved, often complicated and confusing. However, this route is not mandatory. The following method is more efficient and saves time. Instead of contacting the Central Authority, file directly in the appropriate local jurisdiction (the county in which the child resided for the 6 months prior to the abduction) for the return of the child being wrongfully held. Article 29 of the Hague Convention states:

This Convention shall not preclude any person, institution or body who claims that there has been breach of custody or access rights with the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not in the provisions of this Convention.

This method is specifically provided for in 42 U.S.C. paragraph 11603(b). Apply to the Court in the County wherein the child resided for the six months prior to the abduction for an Order to Show Cause directing the return of the child. Show the Court that the

Hague Convention applies, that the requisites have been met, and obtain an order seeking the child's immediate return.

For the Hague Convention to apply, four requisites must be met:

1. The child must be under sixteen years of age;
2. There must have been a wrongful removal or retention of the child, the most obvious example being violation of custody rights;
3. Both parties must be a signatory to the Hague Convention;
4. The party petitioning the Court must demonstrate the child involved was "habitually resident in a contracting state immediately before any breach of custody which encompasses a wrongfully removal.

The first three requisites are clear and unambiguous. However, the Hague Convention does not explicitly define the term "habitual resident." In fact, in Meredith, supra, at 1434, the Court stated "[H]abitual residence is an undefined term in the Convention. It is apparent that it must be determined by the facts and circumstances presented in each particular case."

If a State Court is unclear as to the definition of "habitual residence" within the Hague Convention, it can look to the UCCJA for guidance. In Roszkowski v. Roszkowski, 274 N.J. Super. 620, 634, 644 A.2d 1150 (Ch. Div. 1993), the Court found:

"Given that "habitual residence" in an undefined term, it is appropriate to look to the law of New Jersey for guidance. As previously stated, New Jersey applies the UCCJA to child custody disputes. Under New Jersey law, the child's home state is the state where the child resided for six months immediately prior to the action. Here, the six month requirement is satisfied and both parties do not dispute that Rafal lived in New Jersey for a six month plus period. Thus, under New Jersey law, New Jersey is the home state of Rafal. Accordingly, Rafal's home state will be considered to be his "habitual residence" for purposes of the Hague Convention."

Under the UCCJA and, therefore, under State Law, the child's home state is the state where the child resided for the six months immediately prior to the action. As such, if it can be proven to the Court that a child was a resident of the State of New Jersey for at least six months prior to the wrongful removal, the language within the UCCJA setting six months as the standard can be used to define the ambiguous term of "habitual residence."

Why is the Hague Convention imperfect?

The grounds that exist on which to oppose the return of the child often result in the exact result that the Hague Convention was designed to avoid i.e. some type of custody hearing, with witnesses and evidence, as to the removal. This is especially so when judges are ignorant as to the purpose of the Hague Convention. The four grounds that exist with which the return of the child could be opposed are as follows:

1. The child objects to be returned, and is old enough and mature enough to be able to come to such a decision;
2. The return of the child would put the child at a great physical or psychological risk;
3. The party seeking the return of the child agreed to the child's removal;
4. The return of the child does not guarantee protection of human rights and fundamental freedoms.

All four grounds are somewhat vague, and certainly open to and ripe for litigation.

Certainly the person removing the child can claim that the child objects to being returned. Such an allegation would necessitate an interview of the child, or even, perhaps, psychological experts. There is also the question as to whether the child is old enough or mature enough to make a decision. Is a fourteen year old of sufficient age and maturity to object to the return. Certainly, some fourteen year olds may be, and some are not.

It is also very simple for a party to lie and state that the custodial parent agreed to the child's removal, which allegation would necessitate a plenary hearing. It would then be necessary for the parent who the child was removed from to travel to the country the child was removed to and to fight for the child in that country, completely contrary to the goal of the Hague Convention.

A spouse can very easily claim that returning a child would result in great physical or psychological risk. All a parent who is willing to lie need do is claim physical or sexual abuse, or alcohol or drug abuse on behalf of the other spouse. The result is likely to be a hearing and an extensive expense in regard to attorney's fees and experts. Certainly, if the spouse who removes the child is in the superior financial position to the other spouse, they can use this superiority to their advantage. Having made the allegations, they can hire experts to support their allegations. This certainly results in further delay and the distinct possibility that, if the parent who removed the child has an expert in his corner, and the other parent does not, the parent who removed the child may be successful and benefit from his lies. If the parent who removes the child claims "great physical or psychological risk", they are basically overriding the Hague Convention i.e. he is getting the custody hearing he wants in the wrong jurisdiction, completely contrary to the goal of the Hague Convention.

Opposing the return of the child based upon an argument that said return would not guarantee protection of human rights and fundamental freedoms should not result in the

potential problems the other three grounds can create. Obviously, it would not apply in regard to the return of the child to the United States. It could however be utilized by an individual objecting to the return of a child to a country where, for example a military coup had occurred, a communist government was in power or a country wherein a father would have an absolute right to custody in the event of a divorce.

If both parties act in good faith in regard to the Hague Convention, it is a useful mechanism for the proper return of the children. However, considering that the Convention is invoked upon the wrongful removal of a child, it is very doubtful that both parties are acting in good faith. The reality of the Hague Convention is that the limited grounds on which to oppose the return of the child can be utilized to defeat the purpose of the Hague Convention should the spouse who removed the child chose to do so.