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International child abduction – the interests of the child: the overview of the Russian judicial practice



Cross Border Conference Moscow
Feb,29 - Mar,1 2016



The common problem of the generalization of the judicial practice

- very little
- not published
- no digests
- "reserved" for the official interpretations
- "continental" system of justice (variety of solutions in the same situations)



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The law takes into consideration "the interests of the child"

- adoption
- cases about the defining of the place of living for the child with one of the parents
- cases about deprivation of the parental rights and abolition of the adoption
- penalty with the alimony
- child's opinion is taken into consideration in all cases



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The judges are used to lean on the “interests of the child” in all cases, connected to the children

BUT! “Interests of the child” have no definition in the law
=what means=>
JUDICIAL DISCRETION



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What is understood under “the interests of the child”

- satisfaction of the basic needs (shelter, food, clothes, etc....)
- protection of the child's health
- conditions for the full development (created by parents)
- comfortable conditions of living at home
- material state in the family
- protection of the right for the education (incl. supplementary)
- ability to stay in contact with the other members of the family (incl. brothers and sisters, as well as grandmothers and grandfathers)
- preservation of the social environment of the child (friends, usual activities)
- Possible perspectives of the child's development (external conditions: region, area of the city, infrastructure)

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CONVENTION (1980) comes to Russia

- Very formal and “simple” (clause 12)
- “The interests of the child” — unusual! — are only in the first line

(JUDICIAL DISCRETION?)

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Who is "stronger"?

Formal demand of the convention

Informal "interests of the child"

~~JUDICIAL DISCRETION~~

JUDICIAL DISCRETION



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Formal decision

- The Convention has no power in the relations between the Russian Federation and any other state (clause 38 of the Convention)
- Translocation and retention are legitimate (clause 3 of the Convention):
 - "the joint trusteeship" of both parents is established (100% of Russian parents)
 - translocation of the Russian citizen to the Russian Federation
 - the second parent "did not object" against translocation or retention of the child
 - the question of the trusteeship could not be solved before the translocation
 - which country should be considered as a usual place of living

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The case of F.

The mother is the citizen of Russia, the father is the citizen of Canada, the child was born in Japan. The mother translocated the child from Japan to Russia without the father's permission during the judicial case of the divorce in frames of which the question of the trusteeship was being solved. The translocation was in March 2014. The father went to court in Russia, claiming that the translocation was illegal.

The court refused the lawsuit of the father, pointing out that the translocation happened in March 2014, while the Convention 1980 came into force for Russia and Japan only on the 1st of April 2014 and therefore can not be used (clause 38 of the Convention)

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The case of T.

The mother is the citizen of Russia, the father is the citizen of Finland, the child is the citizen of Russia. The child was translocated to Russia by his mother. The father went to court with a lawsuit of return on the basis of the Convention 1980.

The court refused the lawsuit of the father, pointing out that the father "did not prove" his disagreement against moving of mother and child to Russia, as well as in accordance to the Russian law both parents have the trusteeship upon the child what means, as the court supposes, that the actions of the mother do not break these rights (clause 3 of the Convention)

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The decision according to "the interest of the child"

- the physical and psychological health of child
- the living conditions with each of the parents
- broad interpretation of the definition "not carried out the rights of the trusteeship"
- the adaptation of the child on the new place (you must not "tear him up from the environment")
- the child's opinion

using clause 13 of the Convention or interpreting clause 3 of the Convention

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The case of B.

The mother is the citizen of Russia, the father is the citizen of the Czech Republic and lives in Germany constantly, the child is the citizen of the Czech Republic and Russia. The child was translocated from the Czech Republic, where he had lived more than 5 years to Russia by his mother. The father went to court with the lawsuit on the basis of the Convention 1980.

The court refused the lawsuit of the father, taken into consideration the arguments of the mother that the father did not carry his rights of the trusteeship for a long period of time before the child's departure to Russia, he did not visit his child several months, he did not pay money to support the child (clause 3 of the Convention). In this case the child was also questioned.


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To prove that the abduction has happened less than a year ago

...IS INSUFFICIENT


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The judge takes thoughts

- expects the evidence of the **illegal** translocation (not vice versa)
- wants to make sure that there is no danger for the child after the return (but does not demand to prove its presence)
- uses the common ideas about the justice ("a small child is always with his mother", etc.)
- takes into the consideration the opinion of the trusteeship institution as an important factor
- accepts with tolerance the non-executions of the orders of the court and the false testimonies

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The dispute about the return of the child from Russia in accordance to the rules of the Convention

...usually...

...turns into the dispute about the custody rights.

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The interests of child in the Russian court

- The case of total judicial discretion
- Are used in the cases of Convention 1980 very broadly and are interpreted maximally freely
- Make the plaintiff in the cases of Convention 1980 prove not only the formal basis of its usage, but the accordance to the child's interests

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