

The Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction

An Overview

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Overview

- ◆ *The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* is a multilateral treaty, which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return.
- ◆ The United States ratified the Convention on July 1, 1988, and implemented it by passing the International Child Abduction Remedies Act (ICARA) 22 U.S.C. §§9001 et seq.
- ◆ For a list of participating countries:
 - ◆ www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction

Purpose

- ◆ (a) To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- ◆ b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
- ◆ The court in a Hague case may only decide whether there has been a wrongful taking or retention and if so, order the child returned to the country of her habitual residence.
- ◆ The court in a Hague case may not decide child custody and visitation issues.
- ◆ The court may not evaluate which jurisdiction is preferable.

Administrative and Judicial Remedies

- ◆ The State Department's Office of Children's Issues will help a left behind parent locate their children, find counsel and assist with the return of children.
- ◆ State Department will forward the application to the district attorney who will file a petition.
- ◆ The district attorney does not represent the petitioner.
- ◆ Both the Federal and the State courts have concurrent jurisdiction under ICARA.

When Can the Convention be Used to Return a Child?

- ◆ Both the country of the child's habitual residence and the country to which the child was taken are participants in the Convention;
- ◆ The child is younger than 16 years of age;
- ◆ The child has been "wrongfully removed or retained from the country of its habitual residence
- ◆ The removal is without the consent of the left behind parent
- ◆ The left behind parent has rights of custody and was exercising those rights at the time of removal
- ◆ The abducting parent is unable to establish one of the specified defenses.

We will address two situations in this seminar

- ◆ Representing the Petitioner - i.e., the parent whose child has been abducted to the United States
- ◆ Representing the Respondent - i.e., the parent who has “abducted” the child to the United States.

Representing the Petitioner

- ◆ If the left behind parent files a Hague application through the Central Authority of his country, it is forwarded to the US State Department which will send it to the District Attorney in the county where the child is located.
 - ◆ The District Attorney will file the petition in state court but will not represent the petitioner.
- ◆ Left behind parent may instead retain counsel and file directly in either state or federal court.

Representing the Petitioner

- ◆ The court may require the parties to appear promptly for an initial conference, usually within days of filing the petition. At the conference, the court will review any applications for interim relief and any applications for discovery and will schedule a date for the hearing.
- ◆ Interim relief may include visitation orders and seizure of child's passport
- ◆ Trial may be scheduled within 6 weeks

Representing the Respondent

- ◆ You must act quickly
- ◆ Investigate the facts and defenses
- ◆ Gather evidence and interview witnesses
- ◆ File response
- ◆ In state court, the “initial conference” may be the trial!
- ◆ Consider removal to federal court if filed in State court to buy time.

State or Federal Court

- ◆ Petitioner
 - ◆ The Petitioner may choose either State or Federal Court.
 - ◆ Federal judges rarely handle child related matters and will not be tempted to apply a best interests standard, while state court judges may try to do so, even though judge in Hague case may not consider best interests.
 - ◆ In my experience it depends solely on the judge. Most state court judges, when adequately informed of the law, will apply the Convention as it is written and refuse to consider best interests. Moreover, many counties have a judge designated to handle or hear Hague cases and that judge will be familiar with the law and its application.

State or Federal Court

- ◆ Another stated reason for choosing federal court is that it is may be easier to expedite the case in the federal courts as compared to the crowded family courts.
 - ◆ In my experience I found exactly the opposite. Many state courts set an initial hearing very quickly followed by a trial within four weeks. On the other hand federal courts may not set an initial conference for several months.

State or Federal Court?

- ◆ Respondent
 - ◆ State and Federal courts have concurrent jurisdiction over Hague cases.
 - ◆ If petitioner filed in state court, then respondent may choose to stay in state court or remove the action to federal court.
 - ◆ The removal must be done within 30 days of receipt of the petition. See 28 USC §§1441 and 1146.

State or Federal Court?

- ◆ For removal to Federal court
 - ◆ Copies of all pleadings filed within the state court action must be attached to the notice of removal.
 - ◆ Removing a case will also usually buy the Respondent some extra time to file her response.
 - ◆ When a federal judge is not familiar with the Hague Convention, she will usually assign it to her regular civil calendar with an initial status conference several months later.
 - ◆ However petitioner and/or the State Department will usually ask the judge to fast-track the case.

The Petition

- ◆ The petitioner bears the initial burden of proving 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)
- ◆ Petitioner must allege
 - ◆ The basis of jurisdiction. (22 U.S.C. §9003 (a))
 - ◆ Child is located within the jurisdiction
 - ◆ Both the United States and the country of the child's habitual residence are signatories to the Convention
 - ◆ The child is under the age of 16 (Article 4)
 - ◆ The child was removed by respondent from, or retained away from, his habitual residence
 - ◆ The petitioner had rights of custody of the child (Articles 3 and 5(a))
 - ◆ The petitioner was actually exercising custody rights, (Article 3(b))

The Petition (cont.)

- ◆ The petition should request the court to:
 - ◆ Order the child's prompt return to his habitual residence
 - ◆ Order respondent to pay attorneys' fees and costs pursuant to 22 U.S.C. §9007
 - ◆ Other provisional remedies: the court may take any measures to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition. 22 U.S.C. § 9004(a)
 - ◆ Ask that respondent surrender the child's passport(s)
 - ◆ Arrange for petitioner's visitation with child

The Petition (cont.)

- ◆ Request that all custody proceedings (if any) be stayed pursuant to Article 16 of the Convention
 - ◆ After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

The Petition (cont.)

- ◆ Check the local rules of court. For example the U.S. District Court, Northern District of California requires that all identifying information for any children such as names and dates of birth etc. redacted from any documents filed in court. Failure to do so may result in sanctions.

The Response

- ◆ Remember that Petitioner has burden of proving habitual residence, rights of custody, exercise of rights of custody and wrongful removal. Address these issues in the response as well as any applicable defenses.
- ◆ Habitual residence is often hotly contested and may not be as it first appears.
 - ◆ Count time spent in each country, including temporary visits.
 - ◆ Tell the respondent's story

The Response (cont.)

- ◆ Defenses are:
 - ◆ Consent - Petitioner consented to removal or retention of the child before the alleged removal or retention.
 - ◆ Acquiescence - Petitioner agreed to the removal or retention after the fact.
 - ◆ The child objects to being returned and is of an age and degree of maturity at which its views are appropriate to be taken into account.

The Response (cont.)

- ◆ Defenses (cont.)
 - ◆ More than one year elapsed before the case was commenced and the child has become well settled in the new environment.
 - ◆ Grave risk of harm.
 - ◆ Violation of human rights.

Habitual Residence

- ◆ Not defined in the Convention. Federal Circuits differ
- ◆ Focus on Child's Viewpoint
 - ◆ 6th Circuit - *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993) - Habitual residence can be altered only by a change in geography and the passage of time. Inquiry must focus on the child, not on the parents, and examine past experience, not future intentions.
 - ◆ 3d Circuit - *Feder v. Evans-Feder*, 63 F. 3d 217, 224 (3d Cir. 1995) - Habitual residence is the place where the child has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective.

Habitual Residence (cont.)

- ◆ Focus on Parental Intentions
 - ◆ 9th Circuit - *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001)
 - Court found no settled intent to change children's residence from Israel to US. Consent to 1 year stay, but no agreement beyond. Evidence of children's acclimatization after 1 year not sufficient.
 - ◆ Settled intent of parents to abandon former country of residence determines habitual residence. Without settled intent to create new residence, the parties are not habitually residing in new residence - only a temporary absence from former residence.
 - ◆ Settled intent is a question of fact. Intent may be expressly declared or inferred from one's actions.

Habitual Residence (cont.)

- ◆ Must consider the age of the child when evaluating the effect of acclimatization on habitual residence. When the child involved is very young, acclimatization is not as important as the settled purpose and shared intent of the parents in choosing a particular residence. See *Whiting v. Krassner*, 391 F. 3d 540 (3d Cir. 2004)
- ◆ For a change in habitual residence to have occurred there must be a change in geography sufficient time must have passed for the child to have become acclimatized to the new residence. When the child moves to a new country accompanied by both parents, who take steps to set up a regular household together, the period need not be long. However, when circumstances are such as to hinder acclimatization, even a lengthy period spent in this manner may not suffice.

Habitual Residence (cont.)

- ◆ See *In re Application of Ponath*, 829 F.Supp. 363, 367 (D.Utah 1993) (habitual residence not acquired where mother and child were detained in forum against her desires for ten months by means of verbal, emotional, and physical abuse);
- ◆ *Mozes* cautions that courts should be slow to infer a change in habitual residence when there is evidence of acclimatization, despite uncertain or contrary parental intent.
- ◆ No settled intent where move was conditional. E.g. *Ruiz v. Tenorio*, 393 F.3d 1247(11 Cir. 2004) Habitual residence did not change after 3 years in Mexico where move conditioned on marriage working out (and it didn't).

Habitual Residence (cont.)

- ◆ See also - *Gitter v. Gitter*, 396 F.3d 124 (2d Cir, 2005)
Court found no intent to change children's habitual residence from US to Israel.
 - ◆ A change in habitual residence requires by Parent's shared intent, and relocation of child to the new residence.
 - ◆ Rarely, a new habitual residence may be established if the child has acclimatized to its new surroundings. Courts should be slow to infer that the child's acclimatization trumps the parents' shared intent.

Habitual Residence (cont.)

- ◆ Evidence of Settled Intent
 - ◆ Written agreement between parents to move
 - ◆ Evidence that move is permanent or temporary
 - ◆ Keeping or selling old residence
 - ◆ New residence - purchase or rental. Length of lease.
 - ◆ Storing, shipping, or selling possessions
 - ◆ Employment arrangements - in old residence and new residence
 - ◆ Airline tickets - one way or return
 - ◆ Immigration status. Work visas?
 - ◆ Children's school in new country
 - ◆ Cars - did they sell car, buy a new car
 - ◆ Bank accounts - closed or left open.

Habitual Residence (cont.)

- ◆ Acclimatization - Focus on the following:
 - ◆ Child's academic activities
 - ◆ Child's social engagements, sports programs, extracurricular activities.
 - ◆ New friends, family and other attachments in child's life.
 - ◆ Length of time spent at new location.
 - ◆ Has child integrated into the larger community
 - ◆ Learned the language?

Right of Custody and Exercising Parental Rights

- ◆ Right of Custody
 - ◆ Petitioner must establish that he had right of custody under the law of the habitual residence.
 - ◆ Rights of custody include rights relating to the care of the child and in particular, the right to determine the child's place of residence.
 - ◆ U.S. Supreme Court in *Abott v. Abbott*, 560 U.S. 1 (2010) found that a ne expat clause was a right of custody.
 - ◆ Retain legal expert or consult with Central Authority of habitual residence.
- ◆ Exercise of Rights of Custody
 - ◆ Petitioner must establish that he was actually exercising his custody rights at the time of removal or retention.
 - ◆ Courts usually find exercise of custody rights. 6th Circuit (*Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996) stated that only acts that constitute clear and unequivocal abandonment of the child can cause a person with valid custody rights to be deemed as having failed to exercise those rights under the Hague Convention.

Defenses

- ◆ Consent
 - ◆ It is a complete defense to wrongful removal or retention if petitioner consented in the removal or retention.
 - ◆ Consent must occur before the removal or retention.
 - ◆ Consent may be withdrawn before removal, but not afterwards ("change of heart").
Gonzalez-Cabellero v. Mena, 251 F.3d 789 (9th Cir. 2001)

Defenses

- ◆ Acquiescence
 - ◆ It is a defense that the left-behind parent acquiesced after the removal or retention. However it is difficult to prove.
 - ◆ *Friedrich* test is strict and narrow
 - ◆ Acquiescence requires either an act or statement with the requisite formalities. Such formalities might be testimony in a judicial proceeding, a convincing written renunciation of rights or a consistent attitude of acquiescence over a significant period of time.

Defenses

- ◆ **Grave Risk of Harm**
- ◆ Court not required to return children if it will expose them to “a grave risk of physical or psychological harm or otherwise place the children in an intolerable situation.”(Article 13(b))
- ◆ Grave risk of harm is frequently used but seldom successful because the exception is to be interpreted narrowly.
 - ◆ Courts must not make a custody determination.
 - ◆ It cannot be a back door to determine the best interests of the child. See *Walsh v. Walsh*, 221 F. 3d. 204, 218-219. (1st Cir. 2000)

Defenses

- ◆ Grave Risk of Harm (cont.)
- ◆ Respondent must prove by clear and convincing evidence. Must establish that bad things occurred in the habitual residence that have had an impact on the children and that similar conduct will likely occur in the future.
 - ◆ *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996) says that grave risk of harm can exist in only 2 situations:
 - ◆ If returning child would put child in imminent danger prior to resolution of custody dispute. This would include returning the child to a war zone, famine, or disease.
 - ◆ If there is evidence of serious abuse or neglect of the child, or extraordinary emotional dependence, and if the courts in the country of habitual residence cannot or will not give the child adequate protection.

Defenses

- ◆ Grave Risk of Harm (cont.)
- ◆ Domestic Violence
 - ◆ *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000) recognized that the exposure to domestic violence is a sufficient risk to preclude a child's return under the Convention.
 - ◆ *Blondin v. Dubois*, 189 F.3d 240 (2d Cir. 1999) required determination of whether reasonable accommodations could be made that would adequately protect the children.

Defenses

◆ Child's Objections

- ◆ The court may refuse to return child where:
 - ◆ (1) child objects to being returned and
 - ◆ (2) has attained an age and degree of maturity at which it is appropriate to take account of its views. *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996)
- ◆ Court must consider extent to which child's views have been influenced by abducting parent. *Morrison v. Dietz*, 2008 WL 4280030 (W.D. La. 2008)
- ◆ There is no defined age for a child to be sufficiently mature
 - ◆ *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001) refused to hold as a matter of law that an 8 year old girl was too young
 - ◆ *England v England*, 234 F.3d 268 (5th Cir. 2000) - 12 year old was not mature enough where she had 4 mothers in 12 years, had ADD, learning disabilities and was scared and confused by proceedings.
- ◆ Need expert testimony.

Defenses

◆ One Year and Settled

- ◆ More than one year has elapsed from the date of wrongful removal or retention and the child is now settled in the new environment.
- ◆ No equitable tolling even if abducting parent conceals the child. *Lozano v. Alvarez*, 134 S.Ct. 1224 (2014)
- ◆ How to determine whether a child is "settled"
 - ◆ Mere integration into the new family is not sufficient. Integration into the outside environment and community required.
 - ◆ friendships, activities, school, church
 - ◆ extended family

Defenses

- ◆ Human Rights
- ◆ Return of the child would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.
- ◆ i.e., Return would shock the conscience.

Settlement

- ◆ These cases can be settled
- ◆ In Federal Court, judicially supervised settlement conferences are often effective.
- ◆ Consider hiring a mediator with Hague experience