



# INTERNATIONAL CHILD CUSTODY AND ABDUCTION LAW

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On our increasingly shrinking planet, with its improving internet, travel and communications technology, people are more than ever moving across national boundaries to live with their families and children. When one couples this phenomenon with the fact that more than half of the law cases heard by courts in the United States today are family law related cases, it becomes pretty clear that international child custody law will play an increasingly important part in all our lives.

### **Three Subsets of Law Come Into Play**

- (a) State law, which varies from State to State, but which uniformly involves greater scrutiny in international cases on considerations such as the reason for the relocation with the child, distance, and conditions in the destination country;
- (b) The Hague Convention on the Civil Aspects of International Child Abduction; and
- (c) the Uniform Child Custody Jurisdiction Act (UCCJA), along with its updated replacement, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

State child custody jurisdiction laws are best addressed with an individual lawyer in the relevant State, which is usually considered to be the State in which the child has resided for a period of time preceding the filing of the custody law suit.

### **The Hague Convention**

The Hague Convention includes all but three European countries, but also includes other “westernized” countries around the world, including a few in Africa, South America, former Yugoslav and Soviet republics, and the Middle East.

This Convention requires the immediate return of children taken from their country of “habitual residence” in violation of established “custody rights.” The “custody rights” are to be established at the primary residence (origin country ). Often, the United States State Department becomes involved at some stage in cases involving the U.S., and in a few, the F.B.I. will initiate a criminal action, but the lawyer should carefully note that involving both at the same time can be counterproductive for a client. Please give us a call for a full explanation.

The Hague Convention is actually a Treaty, and it considerably simplifies the old, subjective, fractionalized way of dealing with procedural legal issues between countries. The most important parts of the Convention are Articles 3, 12 and 13, which provide that children shall be returned to their country of habitual residence “forthwith” if it is clear that they have been wrongfully removed or retained in the foreign country.

If the child was abducted for more than a year before the petition was filed, additional proof is needed, due to the fact that the defendant/respondent is then allowed to try to establish that the child shouldn't be returned due to having been successfully settled in the new country/environment, or that the petitioner acquiesced in the initial removal.

In addition, the respondent can try to establish that the non-exercise of custody by petitioner is a bar, or a "grave risk" of psychological or physical harm would result upon return. Prima facie cases for these defenses, as well as burdens of proof are complicated, and a lawyer experienced in international law should be consulted, as the U.S. has implemented legislation in the Federal International Child Abduction Remedies Act.

There are also challenges with legally defining "habitual residence and "wrongfully removed or retained." A wrongfully removed child is often defined as such by a breach of existing custody rights, thus making this area of law a hybrid between domestic (State) and international law. The lawyer/practitioner will need to know both, although the incorporation of domestic law into the Hague Convention yields often unexpected variances, particularly in defining "custody rights."

### **Custody Rights Under The Hague Convention**

"Custody rights" under the Convention can mean, depending on the circumstances, everything from the violation of a custody order to simply visitation rights which have been exercised in a certain way, as well as whatever custody rights that are intrinsic to the parents' respective countries. Thus, the Hague Convention on International Custody protects – and in some ways creates – rights arising by operation of law. If this sounds challenging, it is. A lawyer will run into cases involving dueling "joint custody" and "primary physical custody" scenarios and the interplay of which controls.

Then, of course, there's the need to translate the relevant laws of the respective country(ies) . . . I find that using subcontractors for this purpose saves the client a lot of money. For example, service of process (e.g., a U.S. custody order) in a foreign country requires translation and compliance with the Convention's service requirements. There are useful contractor services that accomplish these purposes at reasonable cost.

First steps. If you're dealing with an custodial abduction from the United States to another country, the best first step is usually (not always) contacting the U.S. State Department's Office of Children's Issues (OCI) to start the process of filing a Petition for Return under the Hague Convention. This Petition is then sent to the foreign country's central authority, and *usually heard in the foreign country's courts* in the locality where the child is living. A good network of foreign lawyers is therefore helpful. The Directory of the International Academy of Matrimonial Lawyers is helpful, as is the list provided to practitioners by the State Department of lawyers with whom the Office of Children's Issues deals.

It goes without saying that the lawyer should, if he hasn't already, obtain a custody order from

the “home state” in the U.S. The translation process and the service of process will then take place both at the Hague and in the foreign country housing the child.

First steps when dealing with an abduction *to* the United States. Hague Petitions regarding children thought to be in the U.S. are sent from the foreign central authority (you have to know what this means and what it is) to the International Division of the National Center for Missing and Exploited Children (NCMEC), which is our own “central authority for incoming cases. The NCMEC refers petitioners to a lawyer near the child’s location.

### **Considerations When Choosing a Lawyer**

And here is an additional layer to consider in choosing a lawyer. At this point, a Petitioner’s lawyer may file in either State or Federal Court, depending on certain factors. And the crucial thing is that ***even if State Court is chosen, the defendant’s lawyer may remove the case to Federal Court as of right.*** For this reason, it is usually preferable that a lawyer with **Federal Court experience is chosen at the outset, in order to avoid having to add additional lawyers (or switch lawyers) in mid-stream and further delay the case.**

It’s easy to criticize the Federal option, but it’s pretty self-evident that these cases fall under the actuality of what the Federal Courts were designed to handle: matters involving foreign powers. Also, as a practice matter, lawyers can thereby avoid “home cooking” on procedural matters which is often found in State Courts, thus adding a dimension of fairness. On the down side, the case is always more expensive to the client if it’s Federal. Why? The lawyer has to be close to perfect to stay out of trouble. There’s an old joke: “What’s the difference between a Federal Judge and God? Answer: God doesn’t secretly believe he’s a Federal Court judge.”

This consideration also creates a near-impossibility for self-representation. A parent choosing a lawyer where the child had been abducted from a foreign country to the U.S. should know that the litigation rules and pleadings rules are different in Federal Court (generally a person may not file paper pleadings) and require choosing a lawyer that has been accepted to practice in Federal Court by the U.S. District Court of that State.

But lawyers shouldn’t altogether rule out the idea of State Court if the opponent isn’t likely to associate Federal counsel or remove the case himself. State Courts sometimes provide faster scheduling if the case involves an emergency. And bear in mind that State Court judges are conditioned to rule based, not on Treaty requirements regarding Jurisdiction, but on “best interests of the child” requirements. Still, it helps to have experience in both Federal and State Courts in order to know when a Treaty will or won’t work in your client’s best interests.

If the lawyer and client wind up in State Court, there’s a good chance that the judge won’t be familiar with the Hague Convention and that counsel will have a great deal of educating to do. The word “Treaty” is likely to cause at least a little uneasiness with a State judge, and when the

accompanying analysis regarding the Implementing Statute is brought into the picture . . . it's a delicate job for a practitioner. An experienced International Custody lawyer will quickly learn how to make this presentation so that it isn't overbearing or incomprehensible. The need for speed, a catechism-style guide to applying the treaty and extreme diplomacy are all called for. Which brings us to . . .

### **Article 15 Determinations**

As pointed out above, an international custody lawyer for a Hague petitioner will sometimes need to call on not only U.S. agencies for support but also the foreign country's central authority and courts. Perhaps one of the most useful ways to begin is to seek a ruling on the petitioner's prima facie case by the foreign country's courts or administrative agencies (which can include the central authority itself in some cases). This request can be made by the court hearing the petition and covers the issues that comprise the elements of a successful case. So, if a lawyer is certain that his client's case satisfies these, and if he's unsure his judge fully understands, he should make this request of the petition-determining court. The ruling is, of course, not binding on the U.S. court, but it is usually very persuasive. It also gives the judge or court the option of side-stepping issues containing material better known to the foreign court by virtue of proximity and issues the U.S. judge wishes to defer decision on. But watch: in some instances, and depending on the foreign country involved, this request can result in substantial delay. These requests should always be made in advance of trial, of course. Article 15 determinations are a good option when faced with a reticent judge and the lawyer needs clarity.

Article 15 determinations in cases of abduction from the United States. These may be sought in either State or Federal Court via specific motion or via motion for declaratory judgment.

In sum, Article 15 determination requests tend to be rare. Other forms of expert or plenary evidence are often used in their stead.

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