INTERNATIONAL KIDNAPING & THE HAGUE CONVENTION:
A SHORT INTRODUCTION

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Introduction

These cases often begin with a phone call: "A child has been taken from [insert foreign country here] and is believed to be in Las Vegas. We need your help to try to recover the child." This article is a summary guide to how a practitioner can recover the child to the left-behind parent, hopefully without "breaking the bank" in the process.

Framework of the Hague Convention

Since 1988, the United States has been a party to The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct. 1980 ["the Hague Convention"]. Its implementing legislation is the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610. As a international treaty, the Hague Convention is on par with the Constitution, and supersedes any conflicting law.

The purpose of the Hague Convention is to ensure the "prompt return" of internationally abducted children to the "State of their habitual residence," so as to "restore the status quo and deter parents from crossing international borders in search of a more sympathetic court."

The Convention does ***not*** give rise to custody proceedings; it simply permits return of children to their countries of habitual residence, where custody proceedings can be held. A Hague Convention case addresses jurisdictional and substantive issues.

Jurisdictional Issues

A proceeding may be initiated in any country "to which the child has been removed or in which it has been retained." It does not matter ***why*** a child is there, or for how long. If a child has been "removed to" or "retained in" another country, a Hague Convention action may be filed there, regardless of local residency or other requirements for any other kind of action. The Convention does not apply to children 16 years or older.

A court petition for return must be filed within one year of the removal or retention to be within the Hague Convention provision requiring "return . . . forthwith." If more than a year passes, a court ***might*** determine that the child is "settled in its new environment" and deny return of the child.

State and federal district courts have concurrent, original jurisdiction. Neither court is entitled to priority. A judgment in a state or federal court, ordering or denying return of a child, is afforded full faith and credit by all other courts in the United States. The federal abstention doctrine does not apply to Hague Convention cases.

A Hague case should generally be filed in whichever court would hear the matter most quickly; often, this is federal court.

Courts have authority to determine the merits of an abduction claim, but ***not*** the merits of the underlying custody claim. The court is to determine ***ONLY*** whether the removal or retention of a child from another country was "wrongful" and, if so, order the return of the child to that place unless the alleged abductor can establish a valid defense. The most important defenses are that the left-behind parent consented or acquiesced in the removal or retention, or that there is "a grave risk" of physical or psychological harm to the child if returned, or that a child of sufficient "age and degree of maturity" objects to being returned.

The substantive inquiry is in three parts: ***Where*** was the child's habitual residence? Did the parent who had the child in the other contracting state ***have*** a right of custody and exercise it? If so, did the removing or retaining parent's actions ***violate*** those rights?

Substantive Issues

The term "habitual residence" is not specifically defined in either the Hague Convention or ICARA, but the concept is critical. The official commentary states that the idea was to ensure that courts treat the issue as "a question of pure fact, differing in that respect from domicile."

The leading case of *Feder v. Feder*, 63 F.3d 217 (3d Cir. 1995), adopted a ***child-centered*** view of habitual residence, determined by looking back in time, and deciding where the child had a "settled purpose" to be at the moment of removal. Where the child was in school, a home had been purchased, and the parents were working, the test was met. Courts have stated that a "settled purpose" cannot be found when the intention to remain in a foreign country is concealed or when presence there is the result of coercion or abuse. Foreign decisions are largely in agreement.

If another country was the habitual residence of the child at the time of the removal or retention, the next question is whether the left-behind parent had "rights of custody" regarding that child, by operation of law, judicial or administrative decision, or an agreement having legal effect under that State's law.

Whether the left-behind parent had a legal "right of custody" by operation of law is usually a simple question, as is whether there has been a "judicial or administrative decision" as to custody. An "agreement having legal effect" can be as formal as a property settlement agreement, or a letter, or even entirely oral, if it can be proven.

Assuming the left-behind parent had rights of custody, the next question is whether those rights were being exercised at the time of removal or retention, or would have been but for the removal or retention. It is important to distinguish between rights of custody and rights of "access," which do not give rise to a right to seek return of the child.

That leaves the question of "wrongfulness," meaning whether the removal or retention was in violation of rights of custody of the left-behind parent that were actually being exercised. The standard of proof is "preponderance of the evidence."

II. Getting the Kids Home – What to File

A left-behind parent may file an application with the Central Authority of that parent's State, to be forwarded to the Central Authority of this country. Alternatively, an application can be made directly to the American Central Authority (the State Department, Office of Children's Issues), which handles Hague Applications through the National Center for Missing and Exploited Children ("National Center"), based in Virginia (www.missingkids.com; (800)-THE.LOST).

The National Center tries to convince an abducting parent to return a child. If it is unsuccessful, it seeks counsel willing to represent the left-behind parent, usually on a *pro bono* basis. Counsel seeks return of a child by filing a "Petition for Return." This office has prepared model forms (discussed below).

The relief requested should be clearly set out, along with a notice of hearing adequate for an interstate custody case, any request for fees and costs, and (usually) an attorney verification (in place of a client affidavit, which might be unavailable from a client in a foreign country). Both the Convention and ICARA prohibit courts from charging filing fees (except the $5.00 "writ fee" in federal district court).

In addition to the Petition itself, the better procedure is to file a "Declaration Establishing the Habitual Residence of the Child(ren)," using the local format for Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") cases, and a separate Notice of Hearing. Counsel should submit proposed orders, including a proposed Order Directing Return of Minor Child.

Article 16 of the Convention prohibits any court from making a custody determination after the filing of the Petition, until the Hague case is concluded. Counsel can file a Notice of Stay of Custody Proceedings, which can be filed in any court in which the abductor tries to start a custody action.

The Petition for Return (and all the necessary accompanying documents) can be personally served by a process server. If there is a danger to the child or of flight, however, then service should be accomplished by law enforcement agents (in federal cases, the U.S. Marshals) while serving orders for "provisional remedies," such as an emergency pickup of the child.

If it such a pick up is necessary, counsel should prepare and file a separate Petition for Warrant in Lieu of Writ of Habeas Corpus, a proposed Order for Issuance of Warrant in Lieu of Writ of Habeas Corpus, and a proposed Warrant in Lieu of Writ of Habeas Corpus. Our model forms also include these documents, and applicable points and authorities.

Neither the Hague Convention, nor ICARA, has any particular requirement for a formal hearing prior to issuance of an Order Directing Return of Child. In practice, however, judges are loathe to issue any such orders without convening at least one hearing on the question.

It is possible to have all relief granted at the initial hearing. Generally, Hague Convention proceedings are law-and-motion type hearings, but judges vary considerably in their preferred

procedures. Sometimes, additional orders are necessary to allow the hearing to proceed, or to allow return of the child to the country of the left-behind parent. The Convention is expansive, indicating that such relief "as is necessary" should be afforded to effect its ends.

Attorneys Fees in a Hague Convention Case

Both the Convention and ICARA provide for award of attorney's fees, costs, and necessary expenses. The Convention uses permissive language. Many practitioners do not realize, however, that ICARA makes such an award ***mandatory***, absent express findings that it would be "clearly inappropriate."

An award of fees has two purposes: to place the parties in the condition in which they were prior to the wrongful removal or retention, and to provide deterrence against future similar conduct by the wrongdoing party. ICARA states that such an award should ***include*** "court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child." Most courts have routinely made or authorized reimbursement of the total actual fees and all costs incurred, regardless of category.

There is authority from other states indicating that an award of fees can be made in a *pro bono* case, but some judges resist making such awards, indicating that no fees were "incurred" in *pro bono* cases. Nevada has no binding authority on this point.

Finally, it should be noted that a number of actionable tort claims may be committed by an abducting parent, going to the kidnap itself (and any torts committed during its accomplishment, such as assault), or to the resulting deprivation of companionship of a child, infliction of emotional distress on the left-behind parent and the child, etc. Especially as to health effects, post-traumatic stress, and other fall-out from the experience, the left-behind parent and the child might not even have ***suffered*** the worst of their damages at the moment the child is returned.

Potential claims include civil conspiracy, or even RICO, depending on the facts. If any of the wrongful actors were lawyers, who went beyond the role of simply representing a bad person, to the point of actively lying to a court, facilitating a kidnap, or participating in the conspiracy to commit it, then case law supports claims against such counsel, as well. Depending on the facts, punitive and special damages might also be sought.

In the experience of the author, circumstances amounting to independently compensable wrongs are the exception, but in some cases a simple fee award in the Hague case may fall far short of actually compensating the left-behind parent for all of the economic and other damages suffered, even when such an award can actually be collected. A surprising number of international abductors are effectively "judgment proof" despite having the resources to mount an international kidnaping.

Forms and Assistance

The National Center for Missing and Exploited Children ((703) 837-6305) is a great resource for information.

This office has put together a package of forms, including the necessary petitions, complaints, motions and orders, and points and authorities on each of the jurisdictional and substantive issues discussed above. Those facing a Hague Convention case can contact the author for a copy at 3551 E. Bonanza Road, Ste. 101, Las Vegas, Nevada 89110; (702) 438-4100 ext. 103; Marshal@WillickPC.com. We can also supply a greatly expanded version of the above information, providing the authorities and citations that could not be included here.

Possible Changes

The author recently had the honor of being one of the 40 politicians, judges, and lawyers gathered from around the country to attend a special symposium put on by the State Department on the future of ICARA and Hague Convention litigation generally. Generally, the consensus was that the Convention and ICARA work well, but that greater outreach and education would be of assistance in expediting the handling of these cases.

It is possible that the "California model" of having Hague cases filed by local District Attorneys may become more common, and certain tweaks to the jurisdictional rules would be helpful. It is uncertain whether any proposed changes would be by formal amendment of ICARA, or by regulatory or even more informal means.

Conclusion

If the facts establish that the State from which the child was removed or retained was the child's habitual residence, that the left-behind parent had a right of custody under the law of that State, and that the alleged abducting parent's retention of the child violated those rights, the child's return can be requested under the Hague Convention, in order to re-establish the "*status quo ante*," putting the parties back into the state of affairs prior to the time of the wrongful removal or retention.

Actual litigation of these cases requires satisfaction of assorted jurisdictional grounds, and then the resolution of a small number of substantive issues, which may look like, but are not to be confused with, questions relating to custody of the child.

The documents that have to be filed are relatively straightforward, and the Hague Convention and ICARA eliminate many of the technicalities regarding authentication, etc., that might otherwise be asserted. The statutory framework is intended to allow as fast a resolution of the issues involved as possible, although anecdotal experience and the published cases make it clear that completion of such a case still can take anywhere from a matter of days to several years.

The statute allows recovery of all fees and costs incurred as a result of an international abduction. Further, in an appropriate case, the kidnaper – and perhaps accomplices – can be

sued in tort, although collection and enforcement of either fee awards or tort damages remains difficult and uncertain.

Generally, the Hague Convention provides an excellent framework for the prompt recovery and return of internationally-abducted children. It is necessary, however, for practitioners to learn the details, tools, and limitations peculiar to the statutory and case law governing this subject to best serve the interests of the parents – and the children – involved.

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