

International Child Abduction - Seminar TEN 23 February 2006

Introduction

As a family law practitioner you may be faced with a number of scenarios that will attract the 1980 Convention on the Civil Aspect of International Child Abduction (“the Hague Convention”).

These scenarios may include:

- (1) advising a parent who has either arrived in Australia with a child that they have removed from another country without the other parent’s permission;
- (2) advising a parent who has unilaterally decided to retain a child in Australia after an agreed period of time such as a holiday;
- (3) advising a parent whose child has not been returned from an agreed period of time in another country ; or
- (4) Advising a parent whose child has been removed from Australia without their permission.

What will your check list or line of inquiry be if you assess that your case may fall within those fact situations referred to above?

You may need to alert your client that they may be facing a summary form of proceeding about where the children’s matters should be litigated. That being the case all the factors that are normally taken into account in a residence case are rarely relevant in Hague Convention matters. Unless they fall into fairly narrow exceptions, your client may well be ordered to return the child to where they removed the child to properly address issues such as relocation in that foreign court.

Identifying Convention Countries

Firstly, you will need to find out what overseas country the child has been removed from or has been taken or retained.

Hague Abduction case

If the country is one of approximately 75 countries that are found in Schedule 2 of the Family Law Regulations you will be able to advise your client that due notice needs to be taken of Australia's commitment to the Hague Convention – an international treaty against the unilateral removal or retention of children from their habitual residence or home country.¹

Non-Hague Abduction case

If the country is not a signatory to the Convention, then the forum issue of where a residence battle should take place when a child has been removed to or retained in Australia, is based on the paramountcy principle in Australia; that is when assessing the balance of conveniens; what forum will better promote the interests of a child.

If a child has been removed from Australia to a non-Hague Convention Country, the Attorney General's Department (Family Law Division) will need to be contacted urgently. Legal representation will be required in that non-Hague Convention Country.

The Hague Convention attempts to mitigate the need for left behind parents to be so disadvantaged by being otherwise compelled to run a residence or forum case in an overseas jurisdiction where all the natural obstacles exist relating to language and the lack of support networks. In Hague matters co-operating Hague Convention countries will act on behalf of the request of the state of the left behind parent to assist in the return of a child.

The Purpose of the Hague Convention

The principal purpose of the Hague Convention is to secure the prompt return to it's home country of a child who has been wrongfully removed or retained from one Convention Country to another and to prevent a perceived advantage to one parent "forum hopping" using a child.

¹As at June 2005 thirty one states and territories had ratified the Convention and a further forty four states had acceded to it. , Kay J loc cit at page 1

The Hague Convention seeks to secure recognition in all other Convention Countries for parental rights over a child under the law of the child's home country.²

By providing a mechanism for the prompt return of a child who has been removed from its home country, the Convention aims particularly to discourage child abduction, a course of action which may often seem attractive to a disgruntled parent given the ease with which international travel is now possible.

The Hague Convention professes to be gender neutral. It is interesting to note that studies of recent Hague cases now show that the main respondents to requests for a child's return are more often mothers seeking to return to their country of origin. The Hague Convention was originally responding to the growing incidence of father's removing children across boundaries in the 1970's.

The experts in this area predict a growth in international child abduction. Justice Kay in his paper "the Hague Convention - order or chaos?" (Dec ed. Australian Fam. Law Journal) comments that such reported cases from Convention countries are "proliferating" at an "exponential rate".

Regulatory Regime - Hague Convention - Family Law (Child Abduction)

Assuming that you are dealing with 2 signatories to the Hague Convention in your fact scenario, you then need to apply the Family Law (Child Abduction) Regulations (the Regulations) to your fact scenario.

The Hague Convention was incorporated into Australian domestic law on 1 January 1987 through the Regulations which provide a legislative framework to the application for the Hague Convention.

² The objects of the Convention are stated under Article 1 of the Treaty Legislation as follows:

- 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 other contracting states"

1995 and 2004 amendments

The Regulations have since been amended a number of times. Substantial amendment was made in 1995 and took effect on 1 November 1995. The most recent amendments were made in December 2004 which significantly altered Regulations 2,3, 14 and 16. Care should be taken when reading cases based on the pre-November 1995 and December 2004 version of the Regulations to ensure the statements of the law are not effected by the 1995 and 2004 amendments.

The provisions of the Child Abduction Regulations are not exclusive. Regulation 6(1) provides that the Regulations are not to be taken as removing or affecting any power of a Court, or the right of any person or body to apply to a Court under Part VII "Children" of the Family Law Act or under any other Law in force in Australia. Regulation 6(2) further provides that a regulation is not to be taken as preventing a Court from making an Order at any time under Part VII "Children" of the Family Law Act or under any other Law in force in Australia for the return of a child to the country where he or she has previously habitually resided.

However, any such order under Part VII will be ancillary to the Hague proceedings.

Precedence of Hague proceedings

The Regulations ordinarily succeed any other law concerning whether a child should be returned to it's home country, and whether the proceedings for parental rights of the child shall be heard in the country where the child presently live or in the child's home country.

As Practitioners, issuing a residence application for a parent in circumstances where there has been a wrongful removal or retention often flags the abduction to the Family Court, who will of its own motion contact the State Central Authority and suspend residence proceedings if they assess they are faced with a fact situation that may attract Australia's obligations under the Hague Convention. If a residence application is pending in the Family Court and the Registry has a Hague Application subsequently filed after the residence

application the judicial officer will stay those residence proceedings until the determination of the Hague proceedings.

Inter-relationship with the Articles of the Hague Convention

The Hague Convention does not; by itself constitute part of Australian domestic. As a result, the provisions of the Hague Convention that is, the Articles, cannot override the terms of the Regulations. This is implicit in Regulation 2(1B) which states that an expression that is used in both Regulations and the Hague Convention has the same meaning in the Regulations as in the Convention "unless contrary appears". The Hague Convention can, however, be used to interpret the regulations.

The Application

The Role of the Central Authority

The Hague Convention requires contracting states to establish administrative bodies called "Central Authorities". A parent whose child has been wrongfully removed can apply to the Central Authority of the child's habitual residence or the Central Authority of any other contracting state, for assistance in securing the return of the child. In Australia our Commonwealth Central Authority is the Attorney General's Department in Barton, Canberra.

In Victoria, the Commonwealth Central Authority has delegated its responsibility for the Hague Convention to the Department of Human Services.

If the Central Authority in Canberra receives a request for the return of a child from a fellow Convention Country, it must under Article 7 of the Hague Convention take all appropriate measures to discover the whereabouts of the child, prevent harm to the child or prejudice to the applicant parent and secure the voluntary return of the child or otherwise bring about an amicable resolution of the matter.

If the child is believed to be located in Victoria, the Attorney General's Department will send the application to the legal services division of the Department of Human Services who will then issue an application

seeking various orders as set out in Regulation 14(1)(a)2(d) including:

- (i) a warrant for the location of the child;
- (ii) an order for the return of the child to the country of habitual residence;
- (iii) interim holding orders which usually seeks that the Department has the authority to make parenting type orders for the benefit of the child;
- (iv) securing the child's location; and
- (v) preventing the removal of the child from a secure location.

In "flight risk" situations, these orders may be made on an ex parte basis. In rare circumstances, a child may be removed from the respondent parent's care to mitigate the risk of "re-abduction."

In Victoria we are fortunate that the Department of Human Services has a social services branch. When the Australian Federal Police attend upon a respondent parent to serve a warrant they will often be accompanied by a social worker from the Department of Human Services who will assess the living environment of the child including risk issues.

Proceedings should be heard expeditiously.

The purpose of the Hague Convention is to provide for a speedy return of abducted children to their home country and so thus the regulation should be heard expeditiously. Regulation 15(2) (iv) demands that within 42 days of the institution the proceedings should be determined.

Requirements to satisfy an order of return of a child under the Regulations

1. There must be an eligible applicant.

2. There must be an eligible child.
3. The child must have been either wrongfully removed to or retained in Australia from another Convention Country or wrongfully removed to or retained in another Convention Country from Australia in breach of the left behind parent's custodial rights.

Eligible Applicants - Parents:

Prior to the amendment of the Child Abduction Regulations in December 2004 there was some uncertainty as to who had standing to bring an application for the return of a child who had been abducted from another Convention Country to Australia. In *Panayotides vs Panayotides* (1997) FLC 92-733 the Full Court held that a parent had standing to bring an application under the Regulations. However, in *A and GS and ORS* (2004) FLC93-199 the Full Court rejected the submission made on behalf of the Commonwealth Attorney General that the Father, who had brought the application for the return of a child to the United States of America, had the necessary standing to do so. The Full Court held that the wording of Regulation 14, as it then read, made it clear that the applications could only be brought by the Central Authority.

Regulations 14 was thus amended and now clearly provides that if a child is removed from a Convention Country, or retained in Australia Form 2 Applications for an Order for the return of a child may be brought by:

- a. A responsible Central Authority;
- b. A person, institution or another body that has rights to custody in relation to the child for the purposes of the Convention ("an Article 3 Applicant" which is defined in Regulation 2).

Relevant Child

The child abduction regulations apply only to a child who is under the age of 16 years; (Regulation 2(1) "definition of child").

Once the child attains the age of 16 years, the regulations do not apply. This is even when the child attains the age of 16 after proceedings have been commenced under the regulations.³

The return of the child between the ages of 16 and 18 must be sought under the general provisions of Part VII of the Family Law Act.

Wrongful removal or retention

Whether a child has been wrongfully removal or retained are requirements which are a matter of fact.

The words "removal" and "retention" are no longer defined in the regulation (they were prior to December 2004 amendments "defined in regulation 3"). The absence of these definitions and any reported decisions related to the issue it is presumed the words are to be given their common meaning.

A wrongful removal requires the physical removal of a child from a Hague Convention Country to another.

A wrongful retention requires a specific occurrence at a specific time which constitutes the act of retention. Commonly a child has been lawfully taken from one country to another, for example, for a holiday or for the exercise of contract with the child and there has been a failure to return the child.

The date on which a child is wrongfully retained is the day following the date the child is due to be returned under any original agreement between the parents, and not from the date on which the threat to retain the child made.

Whether or not the common removal or retention of a child is wrongful in the context of application brought pursuant to Regulation 14 is to be determined by the criteria set out in Regulation 16(1A). That regulation provides a child's removal to or retention in Australia is wrongful if:

³ H[2000] to FamLR (ENG) 51 of page 54

- * the child is under 16 years;
- * the child habitually resided in a convention country merely for the removal to or retention in Australia;
- * the applicant had rights of custody (re: 4(2) under the law of the country which the child habitually resided immediately prior to the removal to or retention in Australia;
- * the child's removal/retention was in breach of those rights of custody; and
- * those rights were being exercised at the time of the child's removal, or have been exercised but for the removal.

Mandatory Return

The return of a child is mandatory if the requirements are met and the application is made within a year of the wrongful removal or retention. (Regulation 16 (1A))

If the application has been made more than a year after the date when the child was first removed to or retained in Australia the person opposing the return has not established that the return is settled in his or her new environment then again subject to the limited exceptions of Regulation 16(3), the court must order the return of the child (Regulation 16(2)).

Rights of Custody

There must be a breach of rights of custody for there to be a role for wrongful removal or retention).

The left behind parent must have been exercising **rights of custody** before his or her removal or retention rights either alone or jointly with another.

Rights of custody may rise by operation of law by judicial, administrative or decisional by agreement having legal affect under Australia and other convention countries. A definition of rights of

custody is required from the requesting country and in the absence of evidence the Family Court in Australia will rely upon *Toric v Toric* (1981) FLC 91-046 at 76 394 where the Court can assume the law in respect of custodial right is the same as it is in Australia and refer to the criteria for establishing custodial rights in Australia found in section 111B(4) of the *Family Law Act 1975*. (referred to below).

Habitual Residence

For a child to come within the scope of the regulations, the child must have been habitually resident in a convention country immediately before his or her wrongful removal or retention.

The meaning of **habitual residence** in Regulation (4) (1) (a) has two elements. The two elements to constitute habitual residence have been stated to be:

- * actual residence in a country for an appreciable period of time; and
- * a settled intention to reside in this country habitually.

A person can only have one place of habitual residence at any given time for the purposes of the Child Abduction Regulations.

Habitual residence is distinguished from issues of domicile. The period of time may not be so long. There have been various cases where habitual residence was acquired after 1 month.

In the recent unreported decision of His Honour Justice Young *DHS v W* (19 December 2005), the parties had relocated to the U.K. from Australia and had been living in the U.K. for 2 months. The Respondent Mother argued that she never intended to change her habitual residence to the UK and argued that one parent cannot change a child's habitual residence. When the family packed up and moved she had plans only to move temporarily and argued that she not share that intention with her husband who considered the family were relocating with their child to have the benefit of his job opportunity with an English football team. She was leaving on a temporary trial basis. She did not communicate this to her Husband.

Two months after relocating the mother returned to Australia wrongfully removing the child on the pretence she was holidaying with the child in France.

His Honour found that the child's habitual residence had changed notwithstanding the subjective intention of the mother as both parties expressly agreed and acted to change their residence to England. The parties ended their secure employment in Australia to relocate to the U.K., they sold motor vehicles, terminated leases on rented accommodation and packed their belongings.

Discretionary Grounds for declining to order the return of the child

The onus of proving the grounds for declining a return lies with the person opposing the return

The Court can exercise a discretion to refuse a return of a child notwithstanding a wrongful removal or retention on a number of limited grounds

Ground 1: No actual exercise of rights of custody by the applicant;

If no one has rights of custody because, (for example, the only person that has such rights is dead) or the applicant fails to meet the legal requirements set out in the relevant provisions; there can be no wrongful removal or retention for the purpose of the regulation.

In Australia, our definition is set out in s 111B(4) of the *Family Law Act 1975*.

The expression "exercising custodial rights" does not mean that an active exercise of custodial rights was necessary, e.g. the child was being cared for by a relative on his or her behalf.

Ground 2: Consent or acquiescence in removal of the child;

"Consent" concerns the state of the mind of the person seeking return before the child was removed. Consent involved agreement or permission to the removal of the person exercising rights of custody.

“Acquiescence” refers to the state of the mind of the person seeking return after the child was removed. Acquiescence must be viewed on the facts and can be either:

- (a) (i) active acceptance signified by express words of consent, in which case there needs to be clear and unequivocal words; or
 - (ii) By conduct and the other party has to believe that there was acceptance, or
 - (iii) Conduct inconsistent with an intention of the aggrieved parent to insist on legal rights and consistent only with an acceptance of status quo, or
- (b) passive acquiescence inferred from silence and inactivity for a sufficient period in circumstances where different conduct is to be expected on the part of an aggrieved parent

However, mitigating factors include that:

- (a) the parent is aware of the other parents act of wrongful removal or retention;
- (b) is aware the removal or retention was unlawful; and
- (c) and is aware in general terms, of his or her rights against the other parent, although it's not necessary to know the full or precise nature of those rights under the Convention.

Ground 3: Grave risk or physical or psychological harms;

The Australian courts are reluctant to find grave risk to a child unless the return country cannot prevent the harm by its own legal remedies.

Before 2004 amendments to the relevant section 16(3)(b), there was some controversy that the strict interpretation of this ground had been relaxed by the High Court decisions in *DP v Commonwealth Central*

Authority ("DP") and *JLM V Director- General, NSW Department of Community Services* 2001 FLC 93-081("JLM"). Although the majority stated that the words of the regulation were not to be afforded a particularly narrow or broad interpretation but their ordinary meaning; their approach in assessing the nature of the proceedings in the return country offended purists like the dissenting Justice Kirby. The majority did not require certainty the child would be exposed to harm but a grave risk of exposure to harm and an inquiry into whether there will in fact be proceedings in the return country and whether that feared harm will be a matter relevant to those proceedings.

In JLM the High Court did not decide the issue of whether the exception had been made out, but said that the Family Court was clearly wrong to say there was no evidence of grave risk. The respondent mother had threatened suicide if she was compelled to return to Mexico and the father was awarded residence. The majority overturned an assumption of comity and natural justice in the return Country.

The High Court held that the Full Court wrongly assumed that residence proceedings would commence in the requesting country if the child was returned, as the mother gave unchallenged evidence that she had no financial resources to fund proceedings in Mexico and that based that point on the experience of a friend , she may have to pay bribes to be successful in residence proceedings. The matter was remitted to the Full Court, who decided that there was evidence of grave risk and that the trial judge had exercised his discretion appropriately. As a result the child was not returned to Mexico.

In DP, the High Court did not make a finding of grave risk but rather the Full Court should have accepted the mother's evidence about the lack of facilities in Greece for the child when the State Central Authority provided no evidence to the contrary. The matter was remitted to a trial judge where the State Central Authority was able to produce evidence of facilities and countered the grave risk argument.

All of this involved a practical investigation into child welfare issues that was to be the domain of the return country not Australia.

Although the wording of this section has been changed to refer to the harm arising out of a return under the convention and deletes reference to the country of previous habitual residence; and to the place or person with whom the child resided; the High Court has indicated that despite reference to grave risk in previous versions of 16(b) consideration must be given of the circumstances that child will find themselves.

Successful non-returns prior to the new amendments included risk of suicide of a parent and a refusal of return to Israel where the travel warning indicated risk of harm notwithstanding that risk is faced by the residents every day. The ability of a parent to return to a country has been considered a grave risk. Generally the court will view suspiciously an abducting parent refusal to return with the child as an attempt to thwart the Convention.

Ground 4: Objection by the child to its return;

Where a child is of sufficient age and maturity and objects to being returned the court may refuse a return order.

Section 111B (1B) states that the Court must not allow an objection by the child to be taken into account in proceedings unless the objection imports a strength of feeling beyond mere expression of a preference or ordinary wish.

The objection must be to the country of return not the parent.

Ground 5: Protection of Human Rights and fundamental freedom;

There has not been a successful defense on these grounds to date. In the Full Court case of *McCall and McCall* (1995) the Court stated the requirement as not simply the return of the child would be incompatible – even manifestly incompatible – with the human rights and fundamental freedoms, but that these freedoms and rights simply do not permit the child's return at all.

In his dissenting judgment in *DP & JLM Kirby J* expressed the view that subreg 3(d) would include a case where it can be demonstrated that, notwithstanding formal adherence to the Child Abduction

Convention, the authorities and officials of the child's habitual residence were so corrupt that due process would be denied to the child prior to the custodial parent, that a return would need to be denied. (at p 88,399 loc cit)

Ground 6: The child settled in new environment (not in the cases of mandatory return for 1 year period commences).

According to one school of thought the court has discretion not to order a return if the application is filed one year after the child has been first wrongfully removed or retained.

However, Justice Kay has argued with the Full Court for some time that there is no discretion according to his interpretation of the regulation and that if the application has been filed after a year of the wrongful removal or retention then Part VII of the Family Law Act applies (see *State Central Authority v Ayob (1997) FLC 92-746* and *SCA v CR (2005) FLC 93-243*).

Assuming the discretion does apply; the child should be more than happy and secure in and adjusted in the new environment, the child also needs to be physically integrated into the environment and this integration encompasses all elements including school, friends home and activities.

Relevant time appears to be the time of the hearing. Kay J comments that the meaning of environment will change according to the age of a child.

The child can still be settled although the child is experiencing problems.

Evidence

Regulation 29 governs the rules of evidence in Hague Convention proceedings. 29 (1) says the usual rules apply to proceedings under regulation 14.

However, there are particular evidentiary provisions in regulation 29 that are not as onerous as our evidence act including the admissibility

of facts stated in a document that supports the application and the admissibility of an affidavit by a deponent who is not available to be cross-examined

Costs

The Child Abduction Regulations provide that neither Central Authority nor a court can require any security of bond for the payment for costs and expenses of proceedings under the regulations.

The court can however make an order that an abducting parent pay "the costs of the application" incurred by the Central Authority or the applicant traditionally Central Authority would not claim costs although they will often incur the costs of the applicant parent in traveling expenses, cost in locating the child and also non-litigation costs.

Costs against Central Authority cannot ordinarily be made

Prescribed forms and procedures

An application by Central Authority under order of Regulation 14(1) must be made in accordance with Form 2 of Schedule 3 (Regulation 14(2)). The person from whom the application is served may then file an answer or an answer in a cross application in accordance with the Form 2a.

The applicant may then file a reply in accordance with Form 2b (Regulation 14(3) (b)).

Children removed from Australia to a Hague Country

Where parents in Australia request the Central Authority in Australia bring an application in a foreign jurisdiction for the return of a child, a formal request will be made of the foreign Central Authority to commence proceedings in the convention country.

A client seeking the return will need to complete of a Form 1: An Application for the Return of a child found in Schedule 3 of the Regulations. In addition affidavit by the parent in respect of the circumstances of the wrongful removal and/or retention and, also an

affidavit by practitioner in relation to the laws relating to custodial rights are required.

The affidavit accompanying the request is of particular importance as it would be relied upon by the court in the country where the child is to determine whether the Australian applicant has rights of custody in relation to the child.

Rights of custody in Australia

Our rights of custody are defined in section 111B(4) and (5) and includes guardianship of the child and responsibility for long term or day to day care, welfare and development of the child, responsibility as to the person with whom the child is to live. A contact order alone will not suffice to attract a custodial right.

The other State Central Authority will communicate with the Australia Central Authority in relation to the application. Personal applications to the foreign Central Authorities are not encouraged.

The manner and approach of other countries to the interpretation of habitual residence, custodial rights and the grounds for refusal can vary. Justice Kirby's concern about comity can be practically realized. If Australia is not strict with returns from other Convention Countries this bad record may impact negatively on Australian children being returned.

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