

# Determining Jurisdiction

## *Hague Convention Decides Which Country Takes Custody Cases in International Child Abductions*

**H**ague Convention on the Civil Aspects of International Child Abduction is a treaty that addresses the problem of parents unlawfully removing children from the country where they reside. To be clear, the Convention is not designed to determine the custody rights of each parent. Instead, it is designed to determine which country should take jurisdiction over the custody case. The Hague Convention can also be used to secure a parent's rights of access to his children.

The Hague Convention requires each participating country to establish what is called a "Central Authority" to oversee and administer the implementation of the provisions of the Hague Convention. The United States Central Authority is the Office of Children's Issues, Department of State, Washington, D.C. At present, 87 countries are signatories to the Hague Convention. (See Status Table: Convention of Oct. 25, 1980 on the Civil Aspects of International Child Abduction, Hague Conference on Private International Law.)

A petitioning parent can use the central authority of either the country where the child was habitually residing or the country where the child was removed, or both, to obtain assistance in effectuating the return of the child. Central authorities are to provide assistance to the petitioning parent in the form of locating the abducting parent; finding the petitioner attorneys who have experience in litigating Hague cases; providing information as to the laws of the country of the child's habitual residence; preventing further harm to the child by taking provisional measures; and providing information relating to the social background of the child.

The provisions of the Convention

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are implemented in the United States through the International Child Abduction Remedies Act (ICARA). ICARA provides that a Petition for the Return of a Child brought under the Hague Convention can be filed in either state or federal court. Many family law practitioners may file the petition in state court simply because they are more comfortable and more familiar with state court proceedings. However, a potential risk of filing a Hague Petition in state court is that the state courts, which routinely handle child custody cases, will not be sensitive to the distinction

between a Hague case, which deals with a jurisdictional issue, and a best interests determination required in a typical custody case.

Federal courts, which do not routinely handle custody cases, may consequently be more inclined to follow the letter of The Hague Convention law and not slip into a best interests determination.

To prove a wrongful removal under The Hague Convention, the petitioner must prove by a preponderance of the evidence that the child was wrongfully removed from the child's country of "habitual residence." The Hague Convention does not define "habitual residence." The determination by the courts of a child's "habitual residence" is intended to be a fact-based determination. In addition, the petitioner must establish that he had custody rights at time of the removal and that he was exercising his custody rights at the time of the removal.

There are several narrow defenses available to the abducting parent. When the court, either federal or state, concludes that the elements of a *prima facie* Hague case of wrongful retention or removal have been established by the petitioner, the burden shifts to the respondent to prove an affirmative defense against the return of the child to the country of habitual residence. *Karhainen*, 445 F. 3d at 228 (citing *Baxter*, 423 F. 3d at 368) and *Abbott v. Abbott* 130 STC 1983, 1997 (2010). "A return order is not automatic, i.e. return is not required if the other parent can establish that a Hague Convention exception applies." Affirmative defenses are to be narrowly construed and are contained in Articles 12, 13 and 20 of the Convention.

Article 12, known as the "Well-Settled" defense, applies if the child or children are in the new country for one year or greater from the date of the



abduction to the date of the filing of the Hague petition. If more than one year has elapsed from the date of the wrongful removal or retention and sufficient evidence is presented that the child is well-settled in his new environment, the defense will apply. The one-year period can be tolled if the abducting parent conceals the whereabouts of the child from the other parent. (Hague Convention Analysis, 51 FED REQ. at 10, 494)

Factors the court looks to in determining whether the well-settled defense applies include the length of and stability of the child's new residence; the child's connections to the new country; the age of the child; the child's attendance at school; the stability of the parent's employment or other means of support; the child and the abducting parents network of friends and relatives; the level of parental involvement in the child's life; and the immigration status of the child and the parent. *Castillo v. Castillo* 597 F. Supp.2d 438.

Article 13 also contains several defenses. The first, known as the "age

and maturity" defense, provides a defense to return when the child objects to being returned and has attained a degree of maturity and an age at which it is appropriate to take account of his views. *DeSilva v. Pitts* 481 F. 3d 1279, 1286 (10 CIR 2007). In considering the defense, the courts will look at whether or not the child's wishes are "the product of undue influence." (Hague Convention Analysis, 51Fed REG at 10, 509 the "limitations of obligation to return").

Another Article 13 defense is when the person from whom the child was removed was not exercising custody rights at the time of removal or retention or had consented to or subsequently acquiesced in the removal or retention. The person who opposes the return has the burden of proving that the other parent was not actually exercising custody rights at the time of the removal or retention, or that there was a consent or acquiescence to the removal or retention. Article 13 also provides for the "grave risk of harm" defense. The defense is established if sufficient evidence is presented that the child would be exposed to a grave

risk of harm if ordered to return to the country of his habitual residence. Sexual or physical abuse are examples of a grave risk of harm.

Article 20 provides a defense if sufficient evidence is presented that "the return of a child should not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.

If one of the above defenses applies, a child will not be returned to the country of his habitual residence even if a wrongful removal is established.

There are resources available online for the practitioner trying a Hague Convention case. See the National Center for Missing and Exploited Children, [www.missingkids.com](http://www.missingkids.com) and the U.S. Department of State, [travel.state.gov/abductions](http://travel.state.gov/abductions). ■

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