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## CHILD CUSTODY CROSSES THE BORDER

In this global economy and with the ease of international travel, we are seeing an increasing number of “international” families, who are essentially families with parents from different countries. The advent of international families presents unique and distinct issues in the area of child abduction. These abductions create numerous legal problems for the parent who seeks the return of a child or children. As a result, the international community has developed laws to assist in protecting these children and returning them to their country of residence so that the appropriate court can determine custody. One of the principal laws addressing international parental child abduction is the Hague Convention.

### **The Hague Convention**

Sixty-eight countries have signed the treaty which is known as the Hague Convention, with the United States ratifying the treaty in 1988. The Hague Convention provides a mechanism for securing the prompt return of wrongfully removed and retained children to their countries of habitual residence. It also addresses visitation and access rights. In the United States, the International Child Abduction Remedies Act (“ICARA”) sets forth procedures for litigating Hague Convention cases in U.S. courts.

The Hague Convention provides for an expedited judicial process to secure the immediate return of children wrongfully removed or retained in any Hague Convention country. Once the child has been returned, the custody dispute can then be resolved, if necessary, in the courts of that jurisdiction. The Hague Convention does not address who should have custody of the child; it only addresses where the custody case should be heard.

Each country that has ratified the Hague Convention has designated a “Central Authority”- a specific government office - to carry out specialized Hague Convention duties. Central Authorities communicate with each other and they assist parents in filing applications for the return of or to gain access to their children under the Hague Convention. The U.S. Department of State serves as the Central Authority for the United States.

The U.S. Department of State has reported that during the period October 1, 2008, through September 30, 2009, the United States received 1,135 new requests for assistance in the return of 1,621 children to the United States from other countries.<sup>1</sup> Of these cases, 828 involved children wrongfully removed to, or retained in, countries that are parties to the Hague Convention. Unfortunately, retrieving children from countries that have not signed the Hague Convention is very difficult or, in many cases, impossible.

The U.S. Department of State reports that the following countries have the highest incidence of reported abductions of children from the United States:

Country	New Outgoing Cases	Number of Children in Outgoing Cases
Mexico	309	474
Canada	74	104
Germany	50	71
United Kingdom	48	71
India*	34	41
Brazil	24	31
Japan*	23	34
Colombia	23	31
Philippines*	20	25
Australia	18	29

*\*Non-Hague Convention Country*

<sup>1</sup>State Department’s Report on Compliance with the Hague Convention on the Civil Aspects of International Abduction, April 2010.

## **Relief Under the Hague Convention**

In order to obtain relief under the Hague Convention, the applicant-parent must establish each of the following:

1. The child's place of habitual residence is within a Convention country;
2. The child was wrongfully removed to, or retained in, a Convention country; and
3. The child at issue is under the age of 16.

If an applicant-parent can establish these factors, a proceeding under the Hague Convention is initiated by filing an application for the return of a child with a Central Authority in either the child's home country or with the Central Authority where the child is located. The applicant-parent also can initiate a judicial proceeding for the return of the child in the Hague Convention country where the child is located. Once the applicant-parent has submitted an application to the Central Authority, he or she must initiate a judicial proceeding for the return of the child.

The applicant-parent has the burden to prove that there has been a wrongful removal or retention. The removal or retention of a child is considered wrongful where:

1. The applicant-parent had custody rights immediately before the removal or retention; and
2. At the time of removal or retention, those rights were actually exercised or would have been exercised but for the removal.

In effect, the Hague Conventions seeks to prevent "forum shopping" so that parents cannot remove a child to a country where they believe the law may be more favorable to them in a custody proceeding. This explains why the Hague Convention focuses on the place of habitual residence - which is the place where the child resided regularly at the time immediately before the removal or retention.

If a party can establish wrongful removal or retention from the child's habitual residence, then the court must return the child to the home country unless it determines that a defense applies.

## **Defenses**

If the court determines that wrongful removal or retention of a child has occurred, the child will be returned to the appropriate country from which the child was removed. The party removing the child may assert as a defense one of the following narrowly construed defenses to the Hague Convention:

**Well-Settled Defense.** This defense is available in cases where a child has become "well-settled" in the new country. Typically, this means that more than one year has elapsed from the date of the wrongful removal to the date of the commencement of the judicial administrative proceeding.

**Non-Exercise Defense.** This defense is available where an applicant-parent is not exercising his or her custody rights at the time of removal or retention.

**Consent.** The court is not bound to return a child who has been removed if it finds that the applicant-parent has consented to or subsequently acquiesced in the removal or retention of the child.

**Child's Objection Defense.** The court also may refuse to order the return of the child if it finds that the child objects to being returned and has obtained an age and degree of maturity at which it is appropriate to take the child's view into account.

**Grave Risk Defense.** The court is not required to return a child if it is determined that the return would expose the child to physical or psychological harm or otherwise place the child at risk for some type of harm or an otherwise intolerable situation.

A major debate is under way as to the future of the "grave risk of harm defense" in Hague Convention international child abduction cases. The move is spearheaded by those who believe that the Hague Convention discriminates against expatriate mothers who are victims of domestic violence and who return to their countries of origin with their children. It is a reaction to a long line of cases that have given the grave risk of harm defense an extremely narrow interpretation, and to the notion that the integrity of the Hague Convention as a whole requires that the well-being of individual children in hard cases must be sacrificed for the greater good of maintaining the integrity of the Hague Convention process.



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While there have been substantial inroads into the issues of domestic violence and the impact of violence on children in the state court systems, the federal courts have lagged behind in analyzing the effect of domestic abuse on minor children in Hague Convention cases. In many instances, in order for the grave risk defense to apply, federal courts require that the domestic abuse must be directed at the minor child. A minority of federal courts, acknowledging the studies on the effects of domestic abuse on children, are now finding that abuse against the mother may well create a grave risk of harm to her children.

The Hague Convention 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. As the global economy continues to grow, and even more international families are created, this treaty will become even more critical in addressing issues of international cooperation in the area of child abduction.

