

# **Parental Child-Snatching: An Overview**

## **THE EPIDEMIC OF PARENTAL CHILD-SNATCHING: AN OVERVIEW**

### **ATTEMPTS TO PREVENT PARENTAL CHILD ABDUCTION, APPLICABLE UNITED STATES LAWS, AND THE HAGUE CONVENTION**

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#### **I. THE NATURE OF THE PROBLEM**

Child-snatching is epidemic. Well over 200 cases of parental child abduction cases occur each day in the United States. Comment, "Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A disarmament Proposal," 18 St. Mary's L. J. 361 (1986).

This article analyzes several facets of the tragedy of child-snatching: ways to curb it, applicable legislation, and judicial responses. The sad bottom line is that although lawyers, judges, diplomats, and legislators can huddle on how to re-unite children with a custodial parent in the most expeditious manner, our responses occur usually after the filing of a court case. Even though many parents kidnap a child as a result of an unfavorable custody decree, over 70% of parental kidnappings occur before custody has been litigated. Id. at 362-363 n. 3.

Parental kidnapping is the abduction and/or concealment of a child without the consent of the other parent. Child snatching, child stealing, and child abduction are synonymous with parental kidnapping. Id. at 364 n. 13.. Parental kidnapping one of the worst forms of child abuse. McKeon, "International Parental Kidnapping; A New Law, A New Solution," 30 Fam. L.Q. 235, 244 (1996); see, Note, "Access Rights: A Necessary Corollary to Custody Rights Under the Hague Convention on the Civil Aspects of International Child Abduction," 21 Fordham Int'l L.J. 308, 318 & n.64 (1997). The mere threat of child abduction is also a form of patent abuse. People v. Beach, 194 Cal. App. 3d 955, 240 Cal. Rptr. 50 (1987).

Sixty percent of all children in the United States now spend some time in a single parent home. In these single parent families (354,000 in 1988), one parent has taken unilateral action to deprive the other parent of contact with the couple's child, in half of these cases (163,200), according to one study, the intent of the abducting parent was to alter permanently custodial access by concealing the child or taking the child out of the state or out of the country. Johnston & Girdner, "Early Identification of Parents at Risk for Custody Violations and Prevention of Child Abductions," 36 Fam. & Conciliation Courts Rev. 392 (1998).

According to another study, 350,000 cases of child abduction occur every year in the United States. Comment, "Procedural Problems in the Adjudication of International Parental Child Abduction Cases," 10 Temp. Int'l & Comp L. J. 445,446 (1996). Ten thousand of those cases involved U. S. children held in foreign countries as pawns of custody disputes between one parent of U. S. citizenship and one of a different nationality. Id.

The rise in international child abduction can be attributed to the increase in marriages and divorces between bi-national couples. These marriages, by their nature, come with cultural, ethnic, and religious differences. The ease of international travel and the fact that many dual national children possess two passports facilitate abductions. Id.

When non-custodial parents resort to kidnapping, they believe they are acting in the best interests of their children. Although a minority of parental kidnappers may actually save their children by taking them out of the reach of the other parent, the motives of most parents who steal their children are not at all altruistic. Parents find a myriad of reasons or self-justification for stealing a child from another parent. Some abductors will find fault with the other parent for nonsensical transgressions; others will steal a child for revenge.

A representative of Child Find said at a congressional hearing on missing children: "Searching parents worry and wonder, constantly tormented by this act. It is a revenge far sweeter and longer lived than a beating or even murder, for it never ends." Note, "Children as Pawns in Their Parents' Fight for Control: The Failure of the United States to Protect Against International Child Abduction," 21 Women's Rts L. Rep. 129, 132 (2000). Still, others will desire the child as a negotiation tool in a divorce settlement. Former husbands may take children in an attempt to regain their masculinity.

A kidnapping parent may also be controlled by feelings of frustration and inadequacy and thus, may want the children to reassure his or her worth. Often, children who are abducted are placed in the role of the other spouse and receive the emotional and, sometimes, physical abuse meant for the non-abducting parent. Moreover, because the children are stolen in a fit of anger or revenge, the abductors eventually realize that they do not want the child once their anger has subsided. According to one source, parents who steal for revenge frequently abandon their offspring after their anger has cooled. Even those who think they want their children can find child-rearing too big a bargain. Many child-snatchers cannot cope with the responsibility. Note, supra, 21 Women's Rts. L. Rep. 129. Children who once had a family, friends, and a secure life find themselves completely abandoned.

Although most parents who steal their children attempt to justify their actions as the only way to ensure the best interests of the child, the child's best interests are usually not considered. In fact, the best interest of the child mandates that parents ask themselves what the consequences of the abduction will be on the child. If parents had the foresight and emotional empathy of the impact of lying to a child across time and deriding the custodial parent, then they would not do it.

## **II. AN EYE ON PREVENTION**

One recent excellent article discusses preventive interventions aimed at settling custody and access issues of families identified as serious at-risk parents for custodial interference. Johnston & Girdner, supra , 36 Fam. & Conciliation Courts Rev. 392. Doctors Johnston and Girdner offer six profiles of parental child-snatchers.

First, parental abductors have several common characteristics: the abductors are likely to dismiss the value of the other parent to the child. They believe that they know, more than anyone else, including a judge, what is best for their child. Second, the children abducted are likely to be very young (2-3 years old), since they are easy to transport and cannot verbally protest or tell others of their history. If older, such children, often manipulated, have colluded with the abducting parent. Finally, the abductors work with an extensive social network of other persons for practical assistance and to keep their whereabouts hidden. Id. at 395.

The first profile is when there has been a prior threat of or an actual abduction. Where parents have made such threats, withheld visitation, or snatched a child in the past, there is a heightened risk for further serious custody violations. Id. . Liquidation of assets or a maximum draw on a credit card is an obvious sign of an intent to abduct. Several interventions for this profile are indicated. First, court orders need to be in place, spelling out contact for the other parent and specifying the consequences for contempt of these court orders.

Doctors Johnston and Girdner also suggest that copies of such court orders be given to agencies that issue passports with the request that the custodial parent be notified if the other parent attempts to obtain copies of such documents without the certified written authorization of both parents or the court. The child's passport can be marked with a requirement that travel is not permitted without the same authorization. The child's and parents' passports may be held by a neutral third party. The court can require (or parents may stipulate) that a substantial bond will be posted by the departing parent, especially if leaving the country for vacation. Id. .

School authorities, daycare persons, and medical personnel should also have a copy of the custody order and can be given explicit instructions not to release the child or any records of the child to the noncustodial parent. If possible, relatives and others who might support a parent in hiding a child should clearly understand their criminal liability if they aid and abet a felony. Older children can be taught how to protect themselves against a parental abduction and how to find help if they are taken. Id.

Supervised visitation, of course, is one fairly stringent method of prevention, which is typically used to prevent recidivism in serious cases of child stealing. Id. At 397.

The second profile of abductors involves parents who abduct their children because they truly believe that the other parent is abusing, molesting, or neglecting their child. They feel that the authorities have not seriously taken the allegations and have not properly investigated their concerns. In these cases, repeated counter-allegations are likely to occur, with a decrease in communication and an increase in the hostility and distrust between parents. Id.

The interventions suggested for the second profile include ensuring that a thorough investigation of the allegations has been undertaken, or is in progress. Frantic parents are likely to become

calmer and more rational if they feel their concerns are being taken seriously. Likewise, accused parents are more cooperative if approached with a respectful request to help the investigators get to the bottom of what might be inciting the suspicions of abuse. During this investigative stage, precautions need to be taken to ensure that there is no ongoing abuse or alternatively, to protect an innocent parent from further allegations. Such precautions may include supervised visitation, especially if the child is young, clearly frightened, or distressed and symptomatic in response to visits. Id. at 398.

In cases of extreme distrust between the parents, the court may have to undertake further steps, including: (1) mandated counseling for one or both parents to ensure appropriate parenting practices where there has been poor judgment or unclear boundaries on the part of a parent; (2) appointment of a special master (co-parenting coordinator and arbitrator) to help parents communicate and "reality-test their mutual distrust," monitor the situation, and make necessary decisions in an ongoing way-, (3) provision of long-term therapy for the child that offers a safe place for the child to sort through his or her realistic fears and phobias and to disclose abuse should it occur or recur; and (4) appointment of a legal representative (guardian ad litem) for the child in the event of further legal action. Id. at 398.

The third profile is the parent who shows signs of flagrant paranoid beliefs or psychotic delusions. In this situation, the intervention must focus on the child and his or her safety and well-being. If the disturbed person is the non-custodial parent, visitation needs to be supervised in a high security facility. Unfortunately, the other parent and the child must be informed about a safety plan at all times. Finally, if there are repeated violations of a visitation order or the child is distressed by the visits, visitation may need to be suspended. Visitation must be suspended where the parent uses the time with the child to transmit messages of harm or to obtain personal information about the other parent's whereabouts. Id. at 400.

The fourth profile is the sociopathic personality. Id. In such a case, therapeutic mediation or family counseling is not wise and may, indeed, result in disaster. The parent with such sociopathic disturbance will not respect his or her word and will manipulate the therapy to shield disclosures and control the process. Id. at 401. Instead, supervised or suspended visitation is required. Id.

The fifth profile involves parents of different nationalities or with dual citizenships, ending a mixed culture marriage. Id. Parents with strong ties to their native lands are strong risks for child-snatching. Because of the shakeup and emotions accompanying divorce, fleeing with the child to the country of origin offers them the appeal of an emotional salve. Taking the child allows them to imprint on the child the culture of their native country as preeminent. Id. . at 401-402. If the foreign country is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, recovery of the child is virtually impossible. Id.

As Doctors Johnston and Girdner provide, several interventions can be called for to deal with the fifth profile, involving a risk of international abduction. Id. at 402. Preventive measures include restricting removal of the child from the state or country without authorization, preventing issuance of the child's passport, or requiring that the parent's and child's passports be surrendered. Difficulties occur where the child has dual citizenship, as foreign embassies and

consulates are not under an obligation to honor these restrictions if the request is made by the ex-spouse who is a non-national. Instead, the requirement can be placed upon the foreigner at risk for abducting to request and obtain these assurances of passport control from his or her own embassy before being granted unsupervised visitation with the child. Id.

The at-risk parent could also post a bond which would be released to the left-behind parent in the event of an abduction. At times of acute risk, airline schedules to foreign countries can be monitored with the possibility that the abducting parent and child can be intercepted prior to departure from the United States or during a scheduled stopover in a country that is a party to the Hague Convention. Id.

The parents may also enter into a stipulation that neither of them will request travel documents for their child, with the understanding that a copy of this stipulation, properly sealed, will be delivered to all of the appropriate offices of the foreign country in the United States, Canada, and Mexico with a cover letter stating that they both wish that the stipulation (consent order) be followed.

A person may petition a foreign court to issue an order which parallels or "mirrors" the provisions of the U. S. court order, and this can be enforced by order of the court in that foreign country. This is a potentially costly time-consuming measure because it usually involves hiring legal representation in the foreign country and crafting a reciprocal order that is in conformity with both countries' child custody laws and procedures. Id. at 402-403. However, the cost may be warranted to diminish the risk involved in granting foreigners their understandable wishes to visit their homeland with their children in countries that are not party to the Hague Convention. It is also important for all involved parties to know that U. S. laws exclude alien abductors, and their foreign relatives and friends who assist in keeping a child abroad, from entry into this country. This information may deter non-U. S. citizens whose interests are to travel in and out of the United States from being party to child stealing.

Although the above measures can help prevent abductions, they do not address the underlying problems that may prompt a parent to abduct to another country, nor do they provide sufficient deterrence to the parent who is highly motivated to abduct. Culturally sensitive counseling and mediation that will discern and address these underlying psychological dynamics are needed to help these parents settle their internal conflicts. They also have to be reminded of (1) the child's need for both parents and (2) the importance of providing opportunities for the child to appreciate and integrate his or her mixed cultural or racial identities. Id. at 403.

The sixth and final profile is when parents feel disenfranchised by the legal system and have a family and social support network in another community. Id. . This group includes several subgroups, including the poor, persons from cultures that put a premium on the gender of a parent or whether a parent will abide by certain religious teachings in raising the child, unmarried mothers, and victims of domestic violence. Id. at 403-404.

The interventions include, as Doctors Johnston and Girdner indicate, a need for a "user-friendly court system," a cooperative clerical staff, language translation services, and support persons who will accompany them through the legal process. Some states may provide a Family Court

Clinic where poor litigants have access to free or pro bono representation. Second, these disadvantaged parents need access to affordable psychological counseling services for themselves and their children to help them manage their emotional distress and vulnerability and strengthen their parenting capacities. Third, family advocates can bridge the cultural, economic, and logistical chasms to other community resources, such as domestic violence services, substance abuse monitoring and counseling, training and employment opportunities, housing options, and mental health services. Id. at 404-405.

Doctors Johnston and Girdner conclude that more restrictive measures are warranted under three conditions: (1) when the risks for abduction are higher as indicated by prior custody violations, clear evidence of plans to abduct, and overt threats to take the child; (2) when obstacles to the location and return of the child are greater, as they are from uncooperative jurisdictions, especially in countries not party to the Hague Convention; and (3) when the potential harm to the child as a consequence of abduction is substantial. Such substantial harm is likely with parents who have serious mental and personality disorders, or in cases where a parent has a history of abuse or violence, or where a biological parent has had little or no prior relationship with the child. Id. at 405. See generally, Schacht, "Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce," 22 U. Ark. Little Rock L. Rev. 565 (2000).

### **III. APPLICABLE LAWS**

Three United States statutes address and explore the procedures for returning abducted children to their "home state." The Uniform Child Custody Jurisdiction Act of 1968 (UCCJA), 9 U. L. A. § 115 (1988), the Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U. S. C. § 1738A (1994), and the Hague Convention on the Civil Aspects of International Child Abduction opened for signature on October 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 ("Hague Convention" or "Convention") each have specific functions to assist the legal system in resolving the confusion that occurs when the child is taken across state or national lines.

#### **A. Uniform Child Custody Jurisdiction Act**

Before 1968, parents who abducted their children after separation or divorce had an excellent chance of being rewarded custody of their children. State courts had virtually unlimited discretion to refuse to recognize or enforce custody decrees of sister states and foreign nations. Courts tended to give great weight to the presence of the child in the state when making custody determinations. This tendency encouraged forum shopping by allowing the abducting parent to find a state that permitted the parent to remain legally unchallenged. If the child-snatcher was able to retain the child for a considerable length of time, he or she could argue the child should remain in the new jurisdiction for stability and security. The result was that child abductors would be rewarded "in the best interests of the child." Comment, "Where to Decide the 'Best Interests of Elian Gonzalez; The Law of Abduction and International Custody Disputes," 31 U. Miami Inter - Am. L. Rev. 323 (2000).

Recognizing this problem, the National Conference of Commissioners on Uniform State Laws drafted the UCCJA to create a national standard to deter parental child abduction. By limiting jurisdiction of custody matters to the courts of a single state, efforts to litigate related custody

matters in more than one jurisdiction were thwarted. Under the UCCIA, a court has jurisdiction to make a custody determination only if (1) the state is the home state of the child at the time of the commencement of the proceeding; (2) the child and his parent or his custodian have a significant connection with the state; (3) the child is physically present in the state and has been abandoned or subject to mistreatment, abuse, or neglect; or (4) if no other state would have jurisdiction under (1), (2), or (3). Uniform Child Custody Jurisdiction Act of 1969, 9 U.L.A. § 3(a)(1988); Comment, supra , 31 U. Miami Inter-Am. L. Rev. 323.

These uniform criteria for selecting the appropriate forum help to avoid jurisdictional competitions and prevent forum shopping. By prohibiting a second court from assuming jurisdiction once litigation has commenced, the UCCJA promotes cooperation between jurisdictions and facilitates enforcing decrees of sister states. The UCCJA also codified the "clean hand" principle where the state to which an abducting parent flees is required to decline jurisdiction, thereby preventing the child-snatcher from benefiting from his or her wrongdoing. Id.

The UCCJA has been adopted by every state and territory; the overall acceptance has proved to be a major deterrent to interstate kidnapping in this country. Id. A major criticism of the UCCJA is that it offers "loopholes." The major loophole occurs in the UCCJA's precatory language and the potential for concurrent jurisdiction. A related problem is that the "home" state can exercise jurisdiction, even though the custodial parent and the child have since moved to another state. Comment, "Court-Sponsored Custody Mediation to Prevent Parental Kidnapping A Disarmament Proposal," 18 St. Mary's L. J. 361 (1986).

Because of the "loopholes" in the UCCJA, the National Conference of Commissioners on Uniform State Laws has drafted and is circulating for passage in the various states, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The UCCJEA specifically gives initial jurisdiction to the "home state" jurisdiction over a "significant contact" jurisdiction, as is the case in the federal PKPA. The UCCJEA also defines a foreign nation as a "state" for purposes of the UCCJEA. The UCCJEA also provides that the state that made the original order has continuing, exclusive jurisdiction unless all parties have left that state. Turner, "Pursuing the Divisible Divorce: Recent Case Law on State Court Jurisdiction in Divorce Cases," 12 no.7 Divorce Litig. 125 (2000); Zorza, "The UCCJEA: What Is It and How Does It Affect Battered Women in Child-Custody Disputes," 27 Fordham Urb. L.J. 909 (2000).

## **B. The Parental Kidnapping Prevention Act**

The Parental Kidnapping Prevention Act of 1980 (PKPA) provides the federal enforcement mechanism for ensuring that states honor the custody determinations of other states. The key provision requires the courts of every state to enforce, rather than modify, custody and visitation orders made by courts already exercising jurisdiction.

Once a state exercises jurisdiction consistent with the provisions of the PKPA, no other state may exercise concurrent jurisdiction over the custody dispute, even if it would have been empowered to take jurisdiction in the first instance, and all states must accord full faith and credit to the first state's ensuing custody decree. Thompson v Thompson , 484 U. S. 174, 177 (1988), citing

Parental Kidnapping Prevention Act of 1980, 28 U. S. C. § 173 8A(g)(1994). The effect of the Supreme Court's decision in Thompson was, not only to limit concurrent jurisdiction between the states, but also to keep the parties from bouncing from state to state and finally into federal court to delay the proceedings. Comment, supra, . 31 U. Miami Inter-Am. L. Rev. 323.

The PKPA prohibits concurrent jurisdiction and protects the exclusive jurisdiction of the state that issued the decree. The PKPA protects the continuing jurisdiction of the decree state to modify the original custody decree as long as (1) the initial custody order was made consistent with the PKPA's jurisdictional hierarchy, (2) the state issuing the original decree continues to have a basis for exercising custody jurisdiction under state law (which need no longer be the "home state"), and (3) the state remains the residence of the child or of any custody contestant.

The PKPA differs from the UCCJA in that it does not require U. S. courts to give full faith and credit to foreign custody decrees. It therefore provides no remedy in international child custody situations. The UCCJEA as noted above, however, does require that courts in the United States recognize and enforce foreign custody decrees.

In 1993, Congress enacted the International Parental Kidnapping Crime Act (IPA), 18 U.S.C. § 1204, making it a federal criminal offense for a parent to wrongfully remove or retain a child outside U. S. borders when the Hague Convention cannot be implemented. Congress reasoned that the United States could request extradition of abducting parents from countries with which the United States has extradition treaties. Once international parental child abduction becomes a federal criminal offense, presumably the federal government will become more active in pursuing the parent and seeking the aid of the foreign governments.

Although IPKA is a step in the right direction, federal law is by its nature limited to the United States. When a U. S. parent and child are residing in a foreign state, that state is not required to comply with U. S. laws unless another agreement exists between the United States and that foreign state. One such major advance is the Hague Convention.

## **C. The Hague Convention**

### ***1. Adaptation of the Hague Convention into United States Law***

The Hague Convention on the Civil Aspects of International Child Abduction became law in the United States in July 1988. The Convention is not an extradition treaty, but a civil remedy for abduction. The Convention does not provide authority for one foreign state to require another foreign state to extradite a parent. Also, a state is bound only if it enacts domestic law adopting the Convention, because the Convention is not self-executing.

In 1988, Congress enacted the International Child Abduction Remedies Act (ICARA) to implement and maintain "uniform international interpretation" of the Convention in the United States. Subsequently, U. S. courts, when dealing with international claims of child abduction, have held that the Convention, as implemented by ICARA, preempts the UCCJA.

The main purpose of the Convention is to ensure that abducted children are returned to the country of habitual residence. Comment, *supra* . 31 U. Miami Inter-Am. L. Rev. 323; Comment, "International Parental Child Abduction: A Global Dilemma With Limited Relief--Can Something Be Done?" 8 N.Y. Int'l. L. Rev. 95 (1995); Comment, "Procedural Problems in the Adjudication of International Parental Child Abduction Cases," 10 Temp. Int'l. & Comp. L. J. 445 (1996).

The Convention does not act as an extradition treaty nor does it attempt to adjudicate the merits of the custody dispute. It is a civil remedy designed to preserve the status quo by returning the child to the country of his or her habitual residence and allowing the judicial authorities in that country to adjudicate the merits of the custody dispute under its own law. It also ensures that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states. Convention, Art. 1.

Indeed, a principal premise of the Convention is that the courts of foreign nations are no less concerned than the courts of the U.S. with the safety and welfare of children who are the subjects of custody disputes. *Fredrich v. Friedrich* , 78 F.3d 1060, 1068 (6<sup>th</sup> Cir. 1996)

The Convention further requires the courts of one nation to repose confidence that the courts of another nation will resolve custody disputes wisely and with compassion. That confidence is most sorely tested in a case where a court is convinced that its judgment and not that of a court in another nation will best serve the interests of a child. The notions of comity demanded by international treaty obligations require the court adjudicating an issue under the Convention to concede that the courts of other nations, even when they might reach a different decision than the adjudicating court would have, are endowed with an equal measure of wisdom and sympathy.

ICARA and the Convention are intertwined. The ICARA broadens the jurisdiction in which a person seeking the return of an abducted child may present the abduction claim. The Hague Convention provides for the designation of a "Central Authority" by each signatory nation. A parent seeking the return of a child who the parent claims has been wrongfully abducted may apply to the Central Authority of the child's habitual residence or of any other signatory nation to the Convention. ICARA additionally provides that any person seeking to initiate judicial proceedings under the Hague Convention for the return of a child may file a petition in any court having jurisdiction. A parent seeking the return of a child under the Convention may thus either apply to the Central Authority or directly initiate a judicial proceeding in a state or federal district court.

## ***2. Habitual Resident***

Under the Convention, courts analyze three requirements to see if the case will remain in the United States. The first requirement is determining the child's habitual residence. The second factor is whether custody rights were violated at the time of abduction. Finally, the court will determine whether the abducting parent can present any legal defenses. Thus, the court first examines whether the child has been wrongfully removed or retained. The petitioner is the party who bears the burden of proof on this issue. If the petitioner establishes that the removal or retention of the child was wrongful, the child must be returned to the country of his or her

habitual residence unless the respondent can establish that an exception to the Convention applies. See, e.g., Blondin v Dubois . 78 F. Supp. 2d 283 (S.D.NY. 2000).

Under the Convention, courts continue to define what constitutes "habitual residence." The construction of "habitual residence" determines where the court proceedings should occur. The determination is fact specific and requires a focus on the child 's ordinary residence and whether, from the child 's point of view, that residence is settled. See, e. g, In re Morris . 55 F. Supp. 2d 1156, 1161-1162 (D. Cob. 1999) (court found that the habitual residence does not shift when a family intends to be in another country for a defined period of less than one year); Janakakis-Kostun v Janakakis . 6 S.W.3d 843, 847-848 (Ky. App. 1999), pet. for cert. filed , 68 U.S.L.W. 3595 (Mar. 8, 2000).

Courts review a myriad of factors in determining a child 's habitual residence. Although the law requires a settled purpose, it does not require the person to stay where he or she is indefinitely. As in Tabacchi v. Harrison . 2000 WL 190576 (N. D. LII. 2000), courts will consider education, business, profession, employment, health, family, or love of a place in determining the residence. The court must also focus on the child, not the parents, to determine residence, and examine past experience, not future intentions. See, Friedrich v Friedrich, supra . 78 F. 3d 1060. The question of whether lawful custody rights were being exercised at the time of the removal must be determined under the law of the child's habitual residence.

### ***3. Custody Rights***

Once the child's habitual residence is determined, courts will not automatically mandate a case to be heard in that country. Courts examine whether or not a child was wrongfully abducted under the Convention. Under Article 13 of the Convention, the judicial authority may refuse to return the child under certain circumstances. The Convention does not require the return of a child unless a person's custody rights have been violated. If there is no wrongful removal or retention of a child, there is no jurisdiction for a federal court to enforce the rights of a non-custodial parent under the Convention. A parent's contentions are not enough to constitute a violation of custody rights. Toren v Toren , 191 F.3d 23 (1st Cir. 1999) (wrongful retention not demonstrated).

An effort to diminish the other parent's visitation rights will also not qualify as a custody violation. Bromley v Bromley . 30 F. Supp. 2d 857 (E.D. Pa. 1998) (no demonstration of wrongful removal or retention where the mother was merely thwarting the English father's visitation rights). See also, Shalit v Coppe . 182 F.3d 1124 (9th Cir. 1999) (petitioner did not prove that removal was wrongful despite an affidavit from his Israeli lawyer stating he had custody rights by operation of Israeli law). One state court broadly construed custody to find that a father was exercising those rights by having regular visitation with his two children and providing for their financial support. Hence, the mother's taking the children from Israel, their habitual residence, to Kansas was wrongful. Sampson v Sampson , 267 Kan. 175, 975 P. 2d 1211 (1999).

After the court determines whether the non-consenting parent's custody rights - under the laws of the state of the child's habitual residence - were breached by the child's removal, the next

inquiry is whether this parent was exercising his custody rights at the time of the child 's removal. Friedrich v Friedrich, *supra* , 78 F. 3d 1060.

One federal court, in pertinent part, states:

The convention... only provides the remedy of return of the child when that child has been removed in violation of the non-consenting parent's right of custody, and does not provide this relief if the non- consenting parent had only a right of access, rather than a right of custody. ( Croll v Croll , 66 F. Supp. 2d 554, 558 (S.D.N.Y. 1999)).

The court's main focus is whether the non-consenting parent was exercising custody rights when the child was removed. In order to decide this issue, the court will analyze the parent's involvement in the child's life. In Tabacchi v Harrison . 2000 WL 190576 (ND Ill. 2000), an American wife married an Italian husband. They lived in Italy where their child was born. The marriage was replete with acts of physical and emotional abuse. The mother took the child to the United States. The United States District Court found that Mr. Tabacchi was exercising his custody rights with proof of significant involvement in his child's life. He fed her, bathed her, played with her, gave her medication, and performed other parental duties. The court found that the child should be returned to Italy, and that the custody trial should be held there. The United States District Court required the Italian father to post an undertaking that he has dropped all criminal charges against his wife and will take all steps to insure that she is not criminally prosecuted.

#### **4. Defenses**

The Hague Convention will not mandate a child 's return to his habitual residence if the abductor can justify his actions. The court strictly construes these defenses in order to uphold the essence of the Convention. Under Article 13(b) of the Convention, the child does not have to be returned to the country of habitual residence if there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The wrongful taking of a child from his or her country of habitual residence normally requires the child's return. See Convention, Art. 12. The Convention, however, provides four exceptions to the general rule. Arts. 12, 13(a), 13(b), and 20. The person opposing return must be able to establish any of the following:

1. the person requesting return was not, at the time of the retention or removal, actually exercising custody rights or had consented to or subsequently acquiesced in the removal or retention. Id. . Art. 13a, 51 Fed. Reg. at 10499, 42 U.S.C. § 1 1603(e)(2)(A);
2. the return of the child would result in grave risk of physical or psychological harm to the child. Id., Art. 13b, 42 U.S.C. § 1 1603(e)(2)(A);
3. the return of the child "would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms," Id. , Art. 20, 51 Fed. Reg. at 10500,42 U.S.C. § 11 603 (e)(2)(A); or

4. the proceeding was commenced more than one year after the abduction, and the child has become settled in the new environment, Id. , Art. 12, 51 Fed. Reg. 10499, 42 U.S.C. § 11603(e)(2)(B).

Different standards of proof exist for each of the foregoing four defenses. See, Nicholson v. Nicholson , 1997 WL 446432 (D.Kan. 1997); Comment, supra, 31 U. Miami Inter-Aim L. Rev. 323; Comment, supra , 8 N.Y. Int'l L. Rev. 95.

The exception spawning litigation is the Article 13(b) exception. That exception provides:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Convention, Art. 13(b). The International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610, the Convention's implementing legislation, provides that a respondent who opposes the return of the child by asserting the Article 13(b) exception has the burden of proving this by clear and convincing evidence. See id. § 11603 (e)(2)(A). The exception is narrow.

A recent case is Walsh v Walsh , \_F.3d\_, 2000 WL 1015863 (1<sup>st</sup> Cir. July 25, 2000). In Walsh , a husband absconded to his native Ireland after being charged with criminal offenses in the United States. The husband petitioned under the Hague Convention on the Civil Aspects of International Child Abduction for return of the children after they were taken to the United States by his estranged wife.

The United States Court of Appeals for the First Circuit, reversing in part the trial court (31 F. Supp. 2d 200), held that, under the Convention, courts are not to engage in a custody determination. It is irrelevant who in the long run is the better parent, or whether the absconding parent had reason to flee and terminate the marriage. 2000 WL 1015863. In construing the Article 13(b) exception, the issue for the ruling court under the Hague Convention is the risk of harm.

Thus, in Walsh , the district court erroneously required a showing of an "immediate, serious threat." 31 F. Supp. 2d at 206. In reversing, the First Circuit, 2000 WL 1015863, stated:

Article 13(b) of the Convention requires a showing that there be a "grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." The Convention does not require that the risk be "immediate"; only that it be grave. The text of the article requires only that the harm be ~'physical or psychological, " but context makes it clear that the harm must be a great deal more than minimal. See Nunez-Escudero v TiceMenley , 58 F.3d 374, 377 (8<sup>th</sup> Cir. 1995). Not any harm will do nor may the level of risk of harm be low. The risk must be "grave," and when

determining whether a grave risk of harm exists, courts must be attentive to the purposes of the Convention. See Hague Convention, art. 1. For example, the harm must be "something greater than would normally be expected on taking a child away from one parent and passing him to another"; otherwise, the goals of the Convention could easily be circumvented.

See also, Janakakis-Kostun, *supra*, 6 S.W.3d 843 (grave risk defense was not established, and the mother was not required to return her daughter to Greece).

Courts, however, have denied return where evidence showed that father had physically and psychologically abused the children and the mother, such as in Rodriguez v. Rodriguez, 33 F Supp. 2d 456 (1999), where the children, whose habitual residence was Venezuela, suffered Post Traumatic Stress Syndrome from abuse. See also, Turner v. Frowein, 253 Conn. 312, 752 Aid 955 (2000) (involving allegation of sexual abuse: court held that before a Hague Convention petition is denied, court must evaluate the full range of placement options and legal safeguard that might facilitate the child's repatriation under conditions that would ensure his or her safety, thereby preserving home country's jurisdiction over underlying custody dispute without endangering the child).

In Blondin v Dubois, 189 F.3d 240 (2d Cir. 1999), *on remand*, 78 F. Supp. 2d 283 (S.D.N.Y.2000), the United States Court of Appeals for the Second Circuit ruled that on a Hague Convention petition, even where grounds for one of the narrow exceptions have been established as a defense to a showing of wrongful removal, the district court is not necessarily bound to allow the child to remain with the abducting parent. In Blondin, the appellate court said that even though the evidence may support a determination that a return of the children to France would expose them to "grave risk" of physical abuse, the district court, on remand, should consider a range of remedies that might allow both the return of the children to their home country and their protection from harm, pending a custody award in due course by a French court with proper jurisdiction. The Second Circuit stated: "The question remaining before us, however, is whether the District Court could have protected the children from the "grave risk" of harm that it found, while still honoring the important treaty commitment to allow custody determinations to be made --if at all possible - by the court of the child's home country." 189 F.3d at 248.

On remand, the district court found that the father had engaged in extensive physical abuse so that return of the children to France would result in further trauma for the children. 78 F. Supp. 2d 283; *see also*, Dalmasso v Dalmasso, 2000 WL 966746 (Kan. 2000) (insufficient evidence to show that return of children to husband in France presented a grave risk of harm or would otherwise place the children in an intolerable situation.)

#### **IV. OTHER REMEDIES**

Other commentators suggest other remedies to curb the epidemic of parental child-snatching. Some of the remedies include civil lawsuits against the abducting parent, the imposition of stiff prison sentences against the abducting parent for kidnapping or custodial interference, and, finally, family mediation. See, Comment, *supra*, 18 St. Mary's L.J. 361, 379-393. The principal trouble with civil damage suits and criminal penalties is that they invite further trauma to the

child who is forced to see one parent inflict further punishment on the parent. The consequences for the developing child of such trauma are enormous. Second, a costly civil damage suit will unlikely reap substantial reward or heal the inflicted parent, whose emotional and psychic is unimaginable.

Criminal sanctions may help a custody case, but may not accomplish the ideal result of returning the abducted child. As stated, such punishment only perpetuates the trauma upon the child.

Even pursuing a Hague Convention case is a costly proposition. According to William M. Hilton, Esq., a Certified Family Law Specialist in California, the sum of \$100,000 may be necessary to litigate a child abduction case in a court of a foreign country, and the average attorney's cost for a single hearing of such a case under the Convention is about \$30,000. Letter of William Hilton, Esq., to Justice William Rigler, dated September 5, 2000.

Family mediation and education are ideal. The question, however, is whether the offending parent who opted for the control technique implicit in abduction will be amenable or suitable to education or have the introspection and flexibility necessary for mediation and counseling.

## V. . CONCLUSION

Child custody disputes continue to occur regardless of state, national, or international laws. The United States, however, has taken a major step in facilitating the return of many children to their habitual residence and their custodial parents. The fact that a parent's claim does not fall within the Hague Convention, as with Cuba's non-signatory status in the recent celebrated case of Elian Gonzalez, should not preclude the availability of legal aid for the left-behind parent. Allowing a jurisdictional question to turn into an international human rights or political issue merely clouds the situation, making the child a conduit for other agendas. See Comment, supra . 31 U. Miami Inter-Am. L. Rev. 323.

The Hague Convention has been a successful tool in securing the safety of internationally abducted children who were wrongfully removed. However, the Convention has potential to achieve an even greater success, if more countries were to become signatories.

Our collective efforts at education of people on family responsibility and judicial enforcement of applicable laws is essential in reducing parental child-abduction. A child's expeditious return is essential to his well-being, and that ultimate goal is compromised when governments cannot agree on legal procedures to implement such a return.