

International Parental Child Abduction

Part I: The Petitioner's Case

by Rana Holz

Parental kidnappings are an unfortunate fact of life in this country and throughout the world. Through uniform adoption of the Parental Kidnapping Prevention Act (PKPA) and the UCCJA (Uniform Child Custody and Jurisdiction Act), and its successor UCCJEA (Uniform Child Custody Jurisdiction and Enforcement Act), parents have the tools to restore preabduction status within the U.S. When a child is abducted abroad, obtaining return of the child can be particularly challenging legally, emotionally, and economically. It is possible and even probable that children who are abducted to the U.S. can be returned to their home country under the authority of *The Convention on the Civil Aspects of International Abduction*, done at the Hague on Oct. 25, 1980 (the "Hague Convention"), and *The International Child Abduction Remedies Act*, 42 U.S.C. §11601 *et seq.* (ICARA). Presently 62 countries have contracted to uphold the Hague Convention.¹

Purpose and Scope of Hague Convention

The Hague Convention is generally intended to restore the preabduction status quo and to deter parents from crossing borders in search of a more sympathetic court.² The Hague Convention specifically protects custody determinations in the international context:

The purpose of the Convention is "to

This article addresses the jurisdictional grounds and burden of proof of the petitioner in an international child abduction case. Next month, the defenses which can be raised by the parent or child in response to a petition for the return of a child will be explored.

protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedure to ensure their prompt return to the state of their habitual residence." See *Currier v. Currier*, 845 F. Supp. 916, 920 (D.N.H. 1994). To this end, the Convention sets forth a carefully delineated analytical framework for the application of its provisions. In accordance with these procedures, courts within signatory countries are to determine whether the children have been wrongfully removed from their place of habitual residence, and are not to overstep the scope of their authority by delving into and attempt-

ing to resolve an underlying custody dispute. *Hague Convention*, Art. 19; 42 U.S.C. §11601(b)(4).³

Not a Custody Determination

The Hague Convention does not permit a foreign court to determine the merits of an underlying custody claim. The foreign court is responsible only for deciding whether the child should be returned to his or her "home" state.⁴ When all the requirements of the Hague Convention are met, a "left-behind" parent may invoke the treaty to have his or her child returned.⁵ "A decision under the Convention concerning the return of the child is not to be taken to be a determination on the merits of any custody issue."⁶ Rather, it is a determination of the issue of proper custody jurisdiction pursuant to an international treaty and federal law.

Choice of Forum

The petitioner has the choice of filing for relief in either the U.S. district court or circuit court, both having concurrent jurisdiction to address Hague matters.

The Petitioner's Case

In seeking return of an abducted child, there are three components to a petitioner's case under the Hague Convention. The first is establishing the petitioner's home country as the children's habitual residence. The second is defining the custody rights which the petitioner enjoyed at or near at the time of abduction. Third, the petitioner

must establish that the removal or retention of the child was wrongful and in violation of the right of custody the petitioner enjoyed under the laws of the home country. If the petitioner establishes these factors, the children must be returned to the home country unless the respondent can establish that an exception to the Hague Convention applies.⁷

Burden of Proof

In a Hague case, a petitioning parent who seeks return of a child must establish by a preponderance of the evidence that the child has been wrongfully removed or retained within the meaning of the Hague Convention.⁸

Habitual Residence

The Hague Convention does not define the term "habitual residence," so we must look to courts to continue to define the term. 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. This determination must focus on the child, not the parents, and examine past experience, not future intentions.⁹ "The change in geography must occur before the questionable removal"¹⁰; therefore, it is not enough to say the U.S. became the child's residence upon removal.

There must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is there is a settled purpose . . . Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.¹¹

"The court must focus on the child, not the parents, and examine past experience, not future intentions."¹² In *Tabacchi*, the court found the child's residence was Italy as that was where the child was born, went to school, played with neighborhood children, had health insurance, and saw doctors. Despite a number of

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trips outside of Italy and even discussions of a permitted trip to the U.S., those discussions were deemed irrelevant as they related to future intentions.¹³

In *Janakakis-Kostun*, an abducting parent argued the U.S. was the children's habitual residence because the parties held U.S. Social Security numbers, bank accounts, and driver licenses, and because they once consulted with a U.S. realtor and had plans to move and settle in the U.S. following the husband's retirement. The court found these arguments unpersuasive.¹⁴

The fact that parents may have dual citizenship or even have claimed dual residency is also not sufficient to establish the children's habitual residence as the U.S. See generally *Freier v. Freier*, 969 F. Supp. 436 (E.D. Mich. 1996) (parents had dual citizenship in U.S. and Israel, focus of court on child and not parents and past experience not future intent). In *Freier*, the court confirmed the law enunciated in *Friedrich I* that "a person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal." 969 F. Supp. at 440.

Custody Rights

The analysis 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. The court determines under the laws of the state of the child's habitual residence whether the nonconsenting parent's custody rights were breached by the child's removal. Article 14 of the Hague Convention allows the authority hearing the case to take judicial notice directly of the law of the state of habitual residence without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

The second step in this inquiry is whether this parent was exercising custody rights at the time of the child's removal.¹⁵ In order to decide this issue, the court will analyze the left-behind parent's involvement in the child's life.¹⁶

In *Friedrich II*, the court cautions against the practice of federal courts creating common law to define what constitutes the "exercise" of custody rights and the exercise of access or visitation rights.

Enforcement of the Convention should not be made dependent on the creation of a common law definition of exercise. The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find "exercise" whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child . . . An American decision about the adequacy of one parent's exercise of custody rights is dangerously close to forbidden territory: the merits of the custody dispute.

Friedrich II also cautions courts against delving into fact-finding ventures, especially in cases where no court order has been entered determining parental rights and responsibilities. *Friedrich II* basically calls for the trial court to accept the petitioner's views and to leave fact-finding which will affect custody determinations to the foreign court.

In *Friedrich II*, at the time of the wrongful removal and retention, the parents were separated without benefit of a court order designating parental rights and responsibilities. The parties had an argument and separated. Mr. Friedrich only visited