The Hague Convention: Application and Analysis to Child Custody Issues

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INTRODUCTION

The child custody disputes that courts must resolve are never easy, and such decisions are frequently even more difficult to enforce. Issues associated with child custody dispute resolution and enforcement are eminently compounded when the parties involved move to international jurisdictions with their children, often in a purposeful maneuver to thwart the force and effect of orders rendered by United States courts. The threat of international evasion tactics is a great source of frustration for courts and parents, and, if acted upon, may leave the care of a child in the hands of the parent who is least likely to prevail in any ultimate custody determination. In an effort to curtail this type of abduction, numerous nations came together to draft the Hague Convention on the Civil Aspects of International Child Abduction on October 25, 1980 (the "Hague Convention").3 The United States is a party to the Hague Convention, and enacted its own version of the Hague Convention in 1988 in the form of the International Child Abduction Remedies Act ("ICARA").4 As of July of 2005, in addition to the United States, approximately sixty countries were signatories to the Hague Convention (each such country shall be referred to hereinafter singly as "Contracting State" and collectively as "Contracting States").5

SUBSTANTIVE APPLICATION OF THE HAGUE CONVENTION

In construing the specific provisions of the Hague Convention and / or ICARA, it is helpful to understand the policies that underlay the drafting of the Hague Convention in its entirety, i.e., that of facilitating the "prompt return of children wrongfully removed" to a foreign

3 See the Hague Convention, T.I.A.S. No. 11,670.
4 See 42 U.S.C. § 11601 et seq.

country, and of ensuring that the rights of "custody and access" afforded to a parent by one Contracting State are "effectively respected" by another.[6] A party's removal of a child will only be subject to being considered "wrongful" under the Hague Convention if both countries at issue (the one from which the child was removed and the one to which the child was taken) were Contracting States on or before the date of the removal in question,[7] and then only if the child at issue has not reached the age of sixteen.[8] A court presented with a Hague Convention petition is in no form or fashion authorized to determine the merits of any custody issue; on the contrary, the sole issue before the court is whether the removal of a child from one country to another is wrongful.[9] If so, unless certain narrow exceptions apply which will be discussed briefly below, the court has no choice but to order the prompt return of the child to the country from which he or she was wrongfully removed.

If a removal is subject to being considered "wrongful" under the Hague Convention because two Contracting States are involved and the child is still under sixteen, the definition of "wrongfulness" that must be applied is as follows:

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5 See Attachment "A" for an up-to-date listing of participating countries.
6 The Hague Convention, art. I., T.I.A.S. No. 11,670.
7 *Hague Convention Abduction Issues* (visited September 26, 2005); http://travel.state.gov/family/abduction/hague_issues/hague_issues_578.html.
8 See the Hague Convention, art. 4, T.I.A.S. No. 11,670.
9 See Mozes v. Mozes, 239 F.3d 1067, 1070 (noting that under Article 16 of the Hague Convention, no custody determination may be made until Hague Convention issues associated with a child's possible return are resolved). As commentator Patricia E. Apy has observed, "Although often thought of as a jurisdictional determination, in fact a return order [based upon a Hague Convention petition] does not establish or abridge subject matter jurisdiction for a determination on the merits of any custody dispute." Patricia E. Apy, Chapter S to 56th Legal Assistance Course Deskbook – Main Volume (May '05), available at www.jagcnet.army.mil/tjaglcs (go to TJAGLCS publications, and then click on "56th Legal Assistance Coursebook Materials, Main Volume (May '05)"), p. 4.

The removal or the retention of a child is to be considered wrongful where -

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and,
(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.[10]

As may be anticipated, the meaning of "habitual residence" and "rights of custody" as set forth in this definition have proven to be hotbeds of litigation.

Habitual Residence

"Habitual residence" is not actually defined anywhere in the Hague Convention. Certainly the concept of "habitual residence" under the Hague Convention and "home state" under the Uniform Child Custody Jurisdiction and Enforcement Act are not one and the same.[11] The seminal case of Feder v. Evans-Feder, 63 F.3d 217 (1995), identifies "habitual residence" as "the place where [a child] . . . has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective."[12] The Feder court furthermore stated that, "a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there."[13]

The Ninth Circuit decision of Mozes v. Mozes, 329 F.3d 1067 (9th Cir. 2001) has been characterized by scholars as a shift in the landscape of "habitual residence" – one that focuses

10 See the Hague Convention, art. 3, T.I.A.S. No. 11,670.
11 See Linda Silberman, "Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence," 38 U.C. Davis L. Rev. 1049, 1064 (2005).
12 Feder, 63 F.3d at 224.
13 Id.

less on the central Feder inquiry of acclimatization and "degree of settled purpose" experienced by a child and more on the intentions of the parents.[14] Importantly, the Mozes analysis was adopted by the 11th Circuit in the case of Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004).

The Mozes court identified three categories of cases that typically arise when the location of "habitual residence" is in dispute. In the first category of cases, a family "jointly take[s] all the steps associated with abandoning habitual residence in one country to take it up in another."[15] Once such steps are taken, the Mozes court noted that most judges faced with Hague Convention cases tend to find that the habitual residence has shifted, despite one parent's alleged reservations about the move.[16] In the second category of cases, the child's relocation to another country is initially "clearly intended to be of a specific, delimited period," and then one parent changes his or her mind and decides to make the move permanent.[17] The Mozes court noted that judges faced with this type of situation tend to find that the one parent's unilateral change of mind is not enough to shift habitual residence.[18] The third category of cases lies between the first and second, arising when the parents have agreed to allow a child to stay in a new country for an indefinite period.[19] In this last category of cases, judges will find habitual residence either to have shifted to the new country or to remain unaltered, depending on a myriad of circumstances.[20] When parental intent is unclear, the level of a child's acclimatization in the new country may be evaluated as part of the court's determination as to whether habitual residence

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14 See id.; Linda Silberman, "Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence," 38 U.C. Davis L. Rev. 1049, 1065 (2005).
15 Mozes, 329 F.3d at 1077.
16 See id.
17 Id.
18 See id.
19 See id.
20 See id.

has shifted.[21] The Mozes court cautioned, however, "that, in the absence of settled parental intent, courts should be slow to infer from [the child's] . . . contacts [in the new country] that an earlier habitual residence has been abandoned."[22]

If an American court finds that the petitioner in a Hague Convention case has failed to demonstrate by a preponderance of the evidence that a child has been removed from his or her habitual residence, then the Hague Convention is rendered inapplicable and no return of the child will be ordered.[23] Although the longer that a particular family or child stays in a particular country the more likely it is for habitual residence to shift from one country to another, the Mozes decision seemingly creates greater difficulty, or at least greater reluctance, in finding that habitual residence has shifted from "Country A" to "Country B."

Rights of Custody

As stated above, the Hague Convention petitioner has the burden of showing that the removal of a child from one country to another "is in breach of [his or her] rights of custody . . . under the law of the State in which the child was habitually resident immediately before the removal or retention . . . ."[24] Therefore, a party bringing a Hague Convention petition under ICARA not only has to initially establish the "habitual residence" of the child in question by a preponderance of the evidence, but he or she also has to demonstrate, under this same standard, that his or her "rights of custody" have been breached.

"Rights of custody" is defined under the Hague Convention as "includ[ing] rights relating

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21 See id. at 1077-78.
22 Id. at 1079.
23 See the Hague Convention, art. 1, 3, and 12, T.I.A.S. No. 11,670; 42 U.S.C. § 11603(e) (setting forth burdens of proof requirements).
24 The Hague Convention, art. 3, T.I.A.S. No. 11,670.

to the care of the person of the child and, in particular, the right to determine the child's place of residence . . . ."[25] Such rights are to be distinguished from "rights of access," which the Hague Convention denotes as "includ[ing] the right to take a child for a limited period of time to a place other than the child's habitual residence."[26]

The phrase "rights of custody" is not limited to situations where there has been an actual custody order entered, but rather has been interpreted broadly enough to address pre-order scenarios where a deteriorating marriage may lead one of the parties to consider leaving the country and taking the child with him or her.[27] The more difficult scenario arises when an actual custody order has been entered, and it is the non-custodial parent (who arguably only has "rights of access") who has filed for relief under the Hague Convention. For an excellent discussion of whether courts have considered a non-custodial parent to have "rights of custody" instead of simply "rights of access," at least where the non-custodial parent had the benefit of a "ne exeat" clause that prevented the custodial parent from removing the child from a particular country, see Linda Silberman's law review article, "Interpreting the Hague Abduction Convention: In Search of Global Jurisprudence."[28] In what Ms. Silberman has dubbed an "encouraging approach," the 11th Circuit has deemed this scenario to create "rights of custody" in the non-custodial parent.[29]

Defenses to Petitioner's Initial Showing

Once a petitioner under ICARA has successfully met his or her burden by demonstrating

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25 The Hague Convention, art. 5, T.I.A.S. No. 11,670.
26 Id.
27 See Linda Silberman, "Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence," 38 U.C. Davis L. Rev. 1049, 1054 (2005); see also 42 U.S.C. § 11603(f)(2) (ICARA provision noting that "the terms 'wrongful removal or retention' and 'wrongfully removed or retained' . . . include a removal or retention of a child before the entry of a custody order regarding that child . . . .").
28 See Linda Silberman, "Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence," 38 U.C. Davis L. Rev. 1049 (2005).

that a child has been "wrongfully removed" within the meaning of the Hague Convention based upon the preponderance of the evidence, the burden then shifts to the respondent to demonstrate, through clear and convincing evidence, that one of the defenses set forth in Article 13 or 20 of the Hague Convention apply.[30] These defenses include: 1) that what many commentators call "left-behind" parent[31] "was not actually exercising the custody rights at the time of removal or retention" of the child;[32] 2) that the "left-behind" parent "had consented to or subsequently acquiesced in the removal or retention" of the child;[33] 3) that "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;"[34] 4) that "the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views;"[35] or 5) that the "return of the child . . . would not be permitted by the fundamental principles of the requested [Contracting] State relating to the protection of human rights and fundamental freedoms."[36] Moreover, if a party waits a year or more to file a petition under the Hague Convention, a court may decline to order a child's return if "it is demonstrated that the child is now settled in its new environment."[37] In sum, although a court deciding a petition brought under the Hague Convention typically has no choice but to return a child "forthwith" if he or she is deemed to

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29 Id. at 1072; see also Furnes v. Reeves, 362 F.3d 702 (11th Cir. 2004) (actual case).
30 See 42 U.S.C. § 11603(e).
31 See, e.g., Patricia E. Apy, supra note 9, p. 4.
32 The Hague Convention, art. 13(a), T.I.A.S. No. 11,670.
33 Id.
34 Id. Such harm has been defined as "returning the child to a zone of war, famine or disease . . .serious abuse or neglect, or extraordinary emotional dependence. . .where the court in the country of habitual residence . . . may be incapable or unwilling to give the child adequate protection." Tahan v. Duquette, 252 N.J. Super 554 (App. Div. 1991).
35 The Hague Convention, art. 13, T.I.A.S. No. 11,670. Courts of several nations, particularly those located in the European Union, have demonstrated a willingness to consider the objections of a child, even at younger ages. See Patricia E. Apy, supra note 9, p. 18.
36 The Hague Convention, art. 20, T.I.A.S. No. 11,670.

have been wrongfully removed from his or her habitual residence,[38] these defenses vest the court with certain narrow pockets of discretionary power to decline to do so. As may be anticipated, these defenses have created controversy to the extent that courts of Contracting States have relied upon them when declining to order a child's return to another Contracting State.

PROCEDURAL USE OF THE HAGUE CONVENTION

Administrative Relief Through the Central Authority

The Hague Convention permits each Contracting State to create vehicles for both administrative and judicial relief under its provisions.[39] For the purpose of administrative relief, each Contracting State must establish a "Central Authority" with the power to accept Hague Convention applications requesting the return of a child.[40] An individual seeking relief under the Hague Convention "may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child."[41] The United States has designated the National Center for Missing and Exploited Children as its Central Authority for the return of all children wrongfully removed from a foreign country to the United States.[42] For return of children that have been wrongfully removed from the United States to a foreign country, the United States Department of State acts as the Central Authority.[43]

If a party files an application for a child's return with either of the Central Authorities designated by the United States, then said Central Authority shall attempt to locate the parent

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37 The Hague Convention, art. 12, T.I.A.S. No. 11,670.
38 See the Hague Convention, art. 12, T.I.A.S. No. 11,670.
39 See Patricia E. Apy, supra note 9, p. 4.
40 See the Hague Convention, art. 6, T.I.A.S. No. 11,670.
41 The Hague Convention, art. 8, T.I.A.S. No. 11,670.

who has the child and facilitate a voluntary return.[44] Despite the fact that a Central Authority is empowered under the Hague Convention to investigate the merits of a filed application,[45] these applications are routinely accepted at face value without further inquiry.[46]

Judicial Relief Under ICARA

At the same time that an individual files an application for return of a child with a United States Central Authority, he or she may also resort to judicial relief under ICARA by filing a Hague Convention petition in either state or federal court[47] "in the place where the child is located at the time the petition is filed."[48] In order to prevent forum-shopping, some federal case law exists to support the notion that a parent who removed the child would be precluded from seeking Hague Convention relief in a United States court.[49] Commentator Patricia E. Apy notes that the pleadings filed in conjunction with any such petition would include "[a] Notice of Petition Under the Hague Convention, [a] Petition for the Return of Children to Petitioner, [an] Order for Issuance of Warrant in Lieu of Writ of Habeas Corpus and / or Order to show Cause, [and an] Order for Return."[50] The petition itself should include a request that, upon a child's ordered return, the respondent also be ordered pay the petitioner's legal fees, care expenses, and travel expenses as authorized under ICARA; this request will be granted unless the respondent

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42 See Patricia E. Apy, supra note 9, p. 5.
43 Id.
44 Id.
45 See the Hague Convention, art. 27, T.I.A.S. No. 11,670 ("When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application.").
46 See Patricia E. Apy, supra note 9, p. 5.
47 See 42 U.S.C. § 11603(a) ("The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the [Hague] Convention.").
48 42 U.S.C. § 11603(b).
49 See Patricia E. Apy, supra note 9, p. 6.
50 Id. at 15.

can demonstrate that such an award would be "clearly inappropriate."[51]

After filing the petition, the petitioner must seek to have the respondent properly served. ICARA states that notice of a petition must be given "in accordance with the applicable law governing notice in interstate child custody proceedings."[52] Entitlement to proper (i.e., reasonable) notice is often somewhat compromised by the court's requirement to "use the most expeditious procedures available" when a Hague Convention petition is filed.[53] Indeed, the Hague Convention contemplates a six-week turnaround by administrative or judicial authorities after which "the applicant or the Central Authority of the requested [Contracting] State shall have the right to request a statement of the reasons for the delay."[54] This time constraint has caused some courts to resort to summary proceedings that do not include the taking of formal testimony.[55] Certainly courts already benefit from at least one form of relaxed evidentiary standard under the Hague Convention itself, which provides that they may take judicial notice "of judicial or administrative decisions, formally recognized or not in the [Contracting] State of habitual residence of the child" without any initial required showing of any kind.[56]

Full Faith and Credit Issues

In the context of Hague Convention petitions, courts will occasionally be presented with an order issued by another U.S. state or another country altogether. Under ICARA's version of a

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51 42 U.S.C. § 11607(b)(3).
52 42 U.S.C. § 11603(c).
53 The Hague Convention, art. 2, T.I.A.S. No. 11,670.
54 The Hague Convention, art. 11, T.I.A.S. No. 11,670.
55 See Patricia E. Apy, supra note, p. 8.
56 The Hague Convention, art. 14, T.I.A.S. No. 11,670. See also 42 U.S.C. § 11605 (providing that no authentication is required for any documents or information included with a Hague Convention petition as a prerequisite for admissibility).

full faith and credit clause,[57] orders issued by another U.S. state must be honored, but orders issued by foreign countries do not.[58] In the latter scenario, a court will have to apply the principles of comity to determine whether or not the foreign order or decree should be followed.[59] In the few cases that have engaged in this type of analysis, the foreign orders that have been recognized and followed have contained extensive findings of fact and have withstood several tiers of appeal in the foreign jurisdiction, thereby seemingly giving the U.S. judges some form of due process comfort.[60]

CONCLUSION

The foregoing provides only a brief glimpse into the complexities that form the Hague Convention and the interplay of various courts with it. The Hague Convention itself represents an effort to uniformly enforce certain international child protection concepts, but its application and results do not always live up to such expectations. Commentators often note that the primary and, to date, largely incurable weakness of the Hague Convention is that courts faced with similar facts often render quite disparate results.[61] In addition, there has been growing criticism that the Hague Convention does not adequately address the situations in which the "abductor" has fled with a child in order to avoid domestic violence.[62] Since the Hague Convention has

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57 See 42 U.S.C. § 11603(g).
58 See 42 U.S.C. § 11602(8) ("the term "State" means any of the several States, District of Columbia, and any commonwealth, territory, or possession of the United States"); see also Diorinou v. Mezitis, 237 F.3d 133, 142 (2001) (noting that the legislative history of ICARA makes clear that "State" was not meant to encompass foreign countries).
59 See, e.g., Diorinou v. Mezitis, 237 F.3d 133, 143-45 (2001).
60 See, e.g., Diorinou v. Mezitis, 237 F.3d 133, 143-45 (2001); Morton v. Morton, 982 F. Supp. 675, 682 (1997).
61 See, e.g., Linda Silberman, "Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence," 38 U.C. Davis L. Rev. 1049, 1058 (2005) (arguing for establishment of a "global jurisprudence" from which international courts faced with Hague Convention issues can draw some semblance of uniformity and consistency).
62 See generally Merle H. Weiner, "Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction." 33 Colum. Hum. Rts. L. Rev. 275 (Spring, 2002).

been in place, however, the likelihood and speed of return of abducted or wrongfully obtained children from Contracting States has improved. Perhaps even more encouraging, it appears that a trend is emerging in which the abducting parent voluntarily returns a child with no further civil process being required once he or she discovers the "left-behind" parent has filed a Hague Convention petition. Thus, the Hague Convention having been created in hope, it appears to be perpetuating hope for the future as well.

ATTACHMENT A

Party Countries and Effective Dates with U.S.

ARGENTINA	1 June 1991	
AUSTRALIA	1 July 1988	
AUSTRIA	1 October 1988	
BAHAMAS	1 January 1994	
BELGIUM	1 May 1999	
BELIZE	1 November 1989	
BOSNIA & HERZEGOVINA	1 December 1991	
BRAZIL	1 December 2003	
BULGARIA	1 January 2005	
BURKINO FASO	1 November 1992	
CANADA	1 July 1988	
CHILE	1 July 1994	
CHINA	Hong Kong Special Admin. Region	1 Sept 1997
	Macau	1 March 1999
COLOMBIA	1 June 1996	
CROATIA	1 December 1991	
CZECH REP.	1 March 1998	
CYPRUS	1 March 1995	

DENMARK	1 July 1991	
ECUADOR	1 April 1992	
FINLAND	1 August 1994	
FRANCE	1 July 1988	
GERMANY	1 December 1990	
GREECE	1 June 1993	
HONDURAS	1 June 1994	
HUNGARY	1 July 1988	
ICELAND	1 December 1996	
IRELAND	1 October 1991	
ISRAEL	1 December 1991	
ITALY	1 May 1995	
LUXEMBOURG	1 July 1988	
FORMER YUGOSLAV (REP. OF MACEDONIA)	1 December 1991	
MALTA	1 February 2003	
MAURITIUS	1 October 1993	
MEXICO	1 October 1991	
MONACO	1 June 1993	
NETHERLANDS	1 September 1990	

NEW	1 October 1991	

ZEALAND		
NORWAY	1 April 1989	
PANAMA	1 June 1994	
POLAND	1 November 1992	
PORTUGAL	1 July 1988	
ROMANIA	1 June 1993	
SLOVAK REPUBLIC	1 February 2001	
SLOVENIA	1 April 1995	
SOUTH AFRICA	1 November 1997	
SPAIN	1 July 1988	
ST. KITTS AND NEVIS	1 June 1995	
SWEDEN	1 June 1989	
SWITZERLAND	1 July 1988	
TURKEY	1 August 2000	
UNITED KINGDOM	1 July 1988	
	Bermuda	1 March 1999
	Cayman Islands	1 August 1998
	Falkland Islands	1 June 1998

	Isle of Man	1 Sept. 1991
	Montserrat	1 March 1999
URUGUAY	1 September 2004	
VENEZUELA	1 January 1997	
YUGOSLAVIA, FEDERAL REPUBLIC OF	1 December 1991	
ZIMBABWE	1 August 1995	

NOTE: Convention **does not apply** to abductions occurring **prior** to the effective date.