International Parental Child Abduction and the Increasing Role for Mediators

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• Today 97 countries are “Contracting States”. The U.S. has partnering arrangements with 76 countries.
• Amongst all contracting States, U.S. has the most child abduction cases.
Purpose of Convention on the Civil Aspects of International of Child Abduction ("Convention")

• It is a civil vs. criminal treaty (e.g. extradition) The Convention is implemented into U.S. law by ICARA.
• Secure the prompt return of children “wrongfully removed to or retained” in any contracting State, and
• Ensure that rights of custody and of access (e.g. visitation) under the law of one contracting State are effectively respected in the other contracting State.
• Treaty is not concerned with which parent is ultimately awarded custody.
• Purely jurisdictional to facilitate the prompt return of the child to her/his “habitual residence” where the country courts can resolve issues of custody and visitation.
Central Authority

• Contracting States designate a “Central Authority” to oversee, facilitate and discharge the duties of the Convention.

• Left behind party (e.g. parent, grandparent) contacts the Central Authority in their home country to begin the process of return.

• In the U.S. the Central Authority is the Office of Children’s Issues at the U.S. Department of State.

• U.S. Department of State publishes an Annual Report on International Child Abduction. Identifies the number of cases by country, inbound and outbound.

• Annual Report identifies which countries have been compliant with the objectives of the Convention.
The State Department’s Role in International Parental Child Abduction Cases

• As Central Authority for the Convention the Department of States Bureau of Consular Affairs leads U.S. Government efforts to prevent abductions and to respond when abductions and wrongful retentions happen.

• Bureau’s Office of Children’s Issues has a special prevention team to reduce the number of abductions that occur. Parents are told of options including using the Children’s Passport Issuance Alert Program (CPIAP) – one of the strongest tools to prevent abductions.
The State Department's Role (Cont.)

• When abductions do take place the Department advises the left behind parent about the initiation of a Convention abduction case. It also advises parents on how to resolve abductions or retentions through voluntary agreements or mediation.

• If parent files for return or access under the Convention the Department forwards the application and documentation to the foreign Central Authority where the child is located. Typically the foreign Authority will seek a voluntary resolution or offer to conduct a mediation between the parents. If unsuccessful it goes to the judicial phase.
Expedited Processing & Jurisdiction of the Courts

• Judicial Authorities of a Contracting State shall “act expeditiously” in proceedings for the return of children, i.e., six weeks from the date of commencement of the proceeding. If not, the requesting Central Authority or applicant may request a reason for the delay. (Convention, Art. 11)

• In the U.S. ICARA allows for the relaxing of the rules of evidence and the admission of evidence without the authentication of documents. ICARA, Section 9005)
Jurisdiction (Cont.)

• Courts shall not decide on the merits of custody.

• In the U.S. ICARA gives the Federal and State courts concurrent jurisdiction of actions arising under the Convention. (ICARA, Section 9003).
What Constitutes a Prima Facie Case?

• Burden of proof. A petitioner shall establish by preponderance of evidence in an action for the return of a child, that the child has been wrongfully removed. (ICARA, Section 9003(e))

• In the case of an action for the return of a child, a respondent (i.e. the “taking parent”) has the burden by “clear and convincing evidence” that one of exceptions set forth in Articles 13(b) or 12 of Convention, or by a preponderance of evidence that any other exception in Article 12 or 13 applies. (See discussion below.)
Prima Facie Case (Cont.)

Petitioner must establish that the child is under the age of sixteen and was:

• Removed from the child’s “Habitual Residence” (Art. 7)

• In breach of a right of custody of the petitioner, and

• Where the petitioner was exercising the right of custody at the time of “wrongful removal”. (i.e. Breach of custody rights)
Effects of Custody Order Concerning the Child

• Abducting parent who wrongfully removes child to another country cannot insulate the child from return merely by obtaining a custody order.

• Petitioner must show that he/she had rights of custody in the country of habitual residence.

• Actual physical custody is not required. The test is whether petitioner had right to make decisions regarding the child’s well-being, including right to determine the place of residence. (e.g. joint custody)

• In one of the first Supreme Court cases on the Convention (Abbott v. Abbot) it was found that *ne exeat* rights (where both parents give consent before a child is permitted to leave the country) constituted a right of custody.
What is Habitual Residence?

• Petitioner must prove that the child was removed or retained away from their country of “habitual residence”. (Article 4)

• Was not defined in the Convention. In the U.S. Federal Circuits have differed on the term’s definition.

• Majority of Circuits focus on the question of whether the parents had a shared intention to establish a habitual residence for the child (e.g. Ninth Circuit. Mozes v. Mozes)

• Minority of Circuits follow decision of the Sixth Circuit and focus on the past experience of the child, NOT future intentions. (Friedrich v. Friedrich)

• Seventh Circuit found that all circuits follow both tests, only differing on emphasis. (Redmond v. Redmond)
Duty to Return Not Absolute Including Affirmative Defenses

• Temporal Qualification (Art. 4, 12, 35) places time limit on the return obligation. Courts are not obligated to return child when the proceeding commenced a year or more after the alleged abduction, and child is “well settled” in the new environment.

• Affirmative Defenses for the respondent include:
  • Petitioner had no right of custody or was not exercising these rights (Art. 13a). Burden on the respondent.
  • Petitioner agreed to the removal (or retention).
Defenses (Cont.)

• There exists a “grave risk” of harm or “intolerable situation” if the child is returned to the petitioner. (Art. 13b). Situation must be “grave”, not just serious. Could include psychological or physical harm, or sexual abuse on part of the petitioner.

• Child’s preference includes child objecting to being returned where child has reached age and degree of maturity, such that the court could take account of the child’s view. Defense is not mandatory.

• Return would not be permitted by the “fundamental principles” of the requested state. Countries differ on whether or how to apply.

• Fundamental principals related to human rights and fundamental freedoms. (Art. 20)
Defenses (Cont.)

• Defenses are to be construed narrowly.
• Burden of proof for respondent is by clear and convincing evidence. For fundamental principles the burden of proof is by a preponderance of evidence. (ICARA)
• The “well settled” defense: in Cases where the proceeding is not initiated within one year of the alleged abduction, the respondent may argue that the child is “well settled” in the new environment.
• Department of State advises the “well settled” means nothing less than substantial evidence of the child's “significant connection” to the abducted to country. (State Department Legal Analysis of the Convention)
Where does Mediation Fit Into International Child Abduction Cases?

• While the Convention has resulted in thousands of “returns”, some are of the view that it is not a perfect instrument.
• Courts, scholars and child advocacy groups continue to make the Convention more responsive to the needs of families.
• International welfare community is calling for an enhanced role of mediation in international abduction proceedings.
• The Hague Conference has acknowledged the importance of voluntary returns where possible without going through an entire Convention proceeding.
Mediation in Child Abduction (Cont.)

- U.S. has been for years in the process of setting protocols to govern mediation for international abduction cases. (ABA)
- Germany adopted a bi-national/co-mediation model. (BAFM)
- Germany and France started project in mid-2000’s for bilateral mediations.
- France’s own mediation model for international abductions enjoys a 86% success rate.
- United Kingdom has a mediation program for international abductions with a 75% success rate. Also used with non-Convention countries such as Pakistan and Dubai. (Reunite)
- Japan now offers mediation.
- Latin America has started to offer mediation in international abduction cases, e.g. Argentina, Brazil, Peru.
Efforts in the U.S.

• While there have been efforts in the U.S. to increase mediation in international child abduction cases, they are far behind many other countries.

• U.S. Central Authority in 2005 tried to engage a bi-national pilot mediation scheme with Germany. The U.S. neither implemented nor funded a formal mediation program.

• ABA’s Section of International Law’s Task Force on Mediating International Parental Child Abduction Cases has recommended action in the field. (2011)
Efforts in the U.S. (Cont.)

• The National Center for Missing and Exploited Children (NCMEC), a Virginia non-profit, offers parents involved in internationally child abduction disputes the option to mediate, and attempts to secure volunteer mediators and attorneys for indigent parents.

• U.S. Central Authority will assist parents seeking mediation in internal abduction cases including providing lists of mediators who do mediations pro-bono or at reduced rates.
Hague Conference Forms of Agreement

• Multi national and multi disciplinary Experts Group developed form “package” agreements, for non-return and for relocation of minor children.

• Will be available on Hague Conference website and from offices of Permanent Bureau in Den Haag.
International Mediation: Benefits & Drawbacks

Benefits of mediation over litigation include:

• Convention can have inconsistent results.
• Convention can be expensive and time consuming.
• Mediation allows for a broader range of issues to be addressed including custody, visitation and support.
• Convention cases can lead to wide range of criminal, civil and economic penalties that could be avoided or cured in mediation.
• Mediation avoids exceptions of the Convention.
Mediation Benefits (Cont.)

Usefulness of mediation in international family disputes through a specialized mediator:

• At a very early stage in a family dispute, mediation can be of assistance in preventing abduction.

• In the context of an international child abduction, mediation between left behind parent and the taking parent may facilitate the voluntary return of the child or some other agreed outcome.

• In the course of a Hague return proceedings, mediation may be used to establish a less conflictive framework and make it easier to facilitate contact between the left behind parent and the child during the proceedings.

• In a return order, mediation between the parents may assist in facilitating the speedy and safe return of the child.
Use of Technology

• Mediators in international family law cases can utilize technology:
  
  ✓ Skype and other apps can be used.
  ✓ No need for anyone to travel.
  ✓ Parties and mediator can be in different locations.
  ✓ Process is thus much less expensive for everyone.
Maintaining Integrity of the Process

- Is the mediator competent to accomplish the mission required for international mediation.
- In U.S. mediators come from different professions. Same is true for international cases.
- Impartiality
- Confidentiality
- Capacity to mediate highly charged and complex mediations involving parties in two or more countries.
References & Citations by Slide

• **SLIDE 1:** See [www.hcch.net](http://www.hcch.net), the website of the Hague Conference. It contains the 1980 Convention, including text and lists countries that have ratified, recent developments, list of network judges and projects. For in-depth study of the convention, see Hon. James D. Garbolino, the 1980 Hague Convention on The Civil Aspects of International Child Abduction: A Guide for Judges (2d. Ed. 2015). Federal Judicial Center


• **SLIDES 3-6:** *Supra,* Slide 2; *Supra.* Slide 1
References (Cont.)

• **SLIDE 7:** Supra, Slide 1


• **SLIDE 9:** *Id.*


• **SLIDE 11:** *Mozes v. Mozes*, 239 F. 3d 1067, 1072 (9th Cir. 2001)

• Fredrich v. Fredrich, 78 f. 3d. 1060 (6th Cir. 1996);

• Redmond v. Redmond, 724 F. 3d 729 (7th Cir. 2013).

• See discussion of Habitual Residence in Arenstein, *supra*. Effective Prosecution at Slide 2; other case addressing Habitual Residence include: *Ruiz v. Tenorio*, 302 F. 3rd 1247 (11th Cir. 2004); *Reyes Ovalle v. Perez*, No. 16568 (11th Cir. 2017); *Cascio v. Pace*, 992 F. Supp. 2d 856 (2014); *Casao v. Pace* also addressed consent of left behind parent and “grave risk of harm”.

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References (Cont.)

• **SLIDE 13:** See discussion of “grave risk of harm” and “parent to parent” in *Gomez v. Fuenmayer*, 812 F. 3d 1005 (11th Cir. 2016).


• **SLIDE 15:** There are many articles, reports and guides which address the subject of mediation in the context of Hague Convention cases. These include:

  Jennifer Jawid, Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators, Miami Inter-Am. L. Rev 2 (2008);
References (Cont.)


• SLIDE 16: Id. Jennifer Jawid

• SLIDES 17-18: Jennifer Jawid, Melissa A. Kuchinski and Duria Gonzalez Martin, supra, at Slide 15.

• SLIDE 20: Supra, Slide 15, Jennifer Jawid; Duria Gonzalez Martin at p. 319-350.

• SLIDE 21: Id.
References (Cont.)


• **SLIDE 23:** See Jennifer Jawid, *supra* at Slide 15.