

The Hague Convention on the Civil Aspects of International Child Abduction

Background

Child Abduction Home Page of the Hague Conference with Full Text of the Convention

<http://www.hcch.net/e/conventions/menu28e.html>

CRC Japan Information Page

<http://www.crcjapan.com/treaties/en/hague-abduction.html>

Additional article on Habitual Residence, by Jeremy Morley

<http://www.international-divorce.com/habitualresidence/>

An Overview

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The Convention applies in cases where:

1. Both the country of the child's habitual residence and the country to which the child was taken have acceded to the Convention;
2. The child in question is younger than 16 years of age; and
3. The child has been "wrongfully removed or retained" in breach of rights of custody under the law of the State of the child's habitual residence.

The Convention is not a vehicle for deciding child access questions. Instead, its main purpose is to ensure that abducted children are returned to the country of habitual residence. It presumes that such disputes are properly resolved in the country where the child habitually resides.

The Convention provides an administrative and a judicial avenue for parties seeking relief. These two remedies are not mutually exclusive; the aggrieved party may pursue one or both of them:

1. Administrative assistance in securing a child's return can be obtained by making an application to the designated Central Authority in the nation where the child habitually resides, or in any other nation that is a party to the Convention. The United States has designated the State Department's Office of Children's Issues in the Bureau of Consular Affairs as its Central Authority.
2. A party may also initiate judicial proceedings in the nation where the child is located. In the United States, federal and state courts have concurrent jurisdiction over Hague Convention cases. A U.S. state or federal court must give full faith and credit to the judgment of any other U.S. state or federal court entered in an action brought under the Convention. One federal appeals court has held that decisions of the courts of foreign nations under the Convention are not entitled to full faith and credit; however, they are entitled to deference under principles of international comity. *Diorinou v Mezitis*, 237 F2d 133, 142-143 (CA 2, 2001).

A party initiating judicial proceedings under the Convention may request either:

1. The return of wrongfully taken children; or,
2. "arrangements for organizing or securing the effective exercise of rights of access to a child."

The remedy to protect a party's "rights of access" is less well defined than the remedy to secure a child's return.

Wrongful Removal “Wrongfulness” is defined as follows in Article 3 of the Convention:

“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”.

Habitual Residence The Convention does not define a child’s “habitual residence”, which is among the most-litigated issues under the Convention. In *Friedrich v Friedrich*, 983 F.2d 1396, 1401 (CA 6, 1993), the U.S. Court of Appeals for the Sixth Circuit noted that “habitual residence” is a flexible concept that bears no real distinction from “ordinary residence.” In determining a child’s “habitual residence” for purposes of the Hague Convention, the court in *Friedrich* set forth the following guidelines:

1. A child’s citizenship is not determinative of habitual residence.
2. A person can have only one habitual residence.
3. “On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward.”
4. “[H]abitual residence can be altered only by a change in geography and the passage of time, not by changes in parental affection and responsibility. The change in geography must occur before the questionable removal.”

In *Feder v Evans-Feder*, 63 F.3d 217, 224 (CA 3, 1995) the Court held that: “A child’s habitual residence is the place where he or she had been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child’s perspective”

If the child’s habitual residence in another country was established because the petitioner fled the United States to avoid criminal penalties, the petitioner may be disentitled to access to U.S. courts.

Rights of Custody Whether a parent does in fact have custody rights is determined by the law of the country in which the child is habitually resident. There is a substantial difference of opinion among the courts of different countries concerning the position of non-custodial parents who retain a right to determine the child’s place of residence. Article 5(a) of the Convention defines “rights of custody” to include the right to determine the child’s place of residence. For this reason, courts in England, America, Australia, New Zealand, France and Israel have ruled that an access parent with the right to consent to the removal of the child from a jurisdiction has a right of custody within the meaning of Article 5, because such a parent has “the right to determine the child’s place of residence”. In *Croll v Croll*, 229 F.3d 133 (2d Cir. 2000), the U.S. Court of Appeals for the Third Circuit took a much narrower position, as have courts in Canada and Ireland.

Exceptions to the Mandatory Return of a Child:

If the conditions for the return of a child to the country of habitual residence are established, there are at least six possible defenses. The burden of proof rests firmly upon the parent who opposes the return. The defenses are:

1. Grave Risk of Harm 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.” Convention, Article 13b. The United States Court of Appeals in *Friedrich v Friedrich* held that a “grave risk of harm” for the purposes of the Convention can exist only in two situations. First, if returning the child would put the child in imminent danger prior to the resolution of the custody dispute - e.g. returning the child to zone of war, famine or disease. Second, if there is evidence of serious abuse or neglect, or extraordinary emotional dependence, and if the court in the country of habitual residence is incapable or unwilling to give the child adequate protection. Courts in England have adopted a more stringent approach.

2. Human Rights Issue That 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.” Convention, Article 20.

This provision was intended to deal with the rare occasion when the return of a child would utterly shock the conscience of the court or offend all notions of due process. It is almost never utilized by the courts.

This information is not intended to give legal advice about a specific legal problem, and is provided with the understanding that if legal advice is required the services of a competent attorney should be sought.

3. More Than One Year That more than one year has elapsed from the date of the alleged wrongful removal or retention, and the child is now settled in the new environment. However,

Article 12 provides that *if the application is made within one year of the date of wrongful removal or retention, the authority concerned shall order the return of the child immediately. It also states that if the application is made more than one year after the date of wrongful removal or retention, the authority shall still order the immediate return of the child unless it is shown that the child is now settled in its new environment.* Time starts running from the moment the child is wrongfully removed, or when the left behind parent withdraws his or her consent.

[CRCJ Note: Making an application does not require that the exact location of the child in the destination country has been found first, and it is done from the country of habitual residence.]

4. Not Exercising Custody Rights That the petitioner was not exercising his or her custody rights at the time of removal or retention. Convention, Article 13a.

5. Consent That the petitioner had consented to or subsequently acquiesced in the removal or retention. Convention, Article 13a.

6. Child's Objection 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." Convention, Article 13b.

For this defense, there is a two-fold test, namely:

1. Does the child object to being returned to its place of habitual residence; and
2. Has the child obtained an age and degree of maturity at which it is appropriate to take account of its view?

Undertakings If a court decides that a child must be returned to its country of habitual residence, it may make the return contingent upon certain "undertakings" from the petitioning parent. These may include:

- A requirement that the petitioner pay for the respondent and child to travel to the country where the child habitually resides.
- A requirement that the petitioner make appropriate housing arrangements for the respondent and child in the country where the child habitually resides.
- A requirement that the petitioner pay living expenses for the respondent and child in the country of the child's habitual residence.
- An order that the petitioner have no contact with the respondent if the respondent returns to the country of the child's habitual residence.
- An order that the petitioner will have no contact or limited (e.g., supervised) contact with the child once the child returns to the country of the habitual residence.

END