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Ready, Set, Go to Federal Court: The Hague Child Abduction Treaty, Demystified

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By Jennifer Baum – July 14, 2014

The Hague Convention on the Civil Aspects of International Child Abduction may sound intimidating, but is easily demystified. Since 1980, signatory nations have agreed that parents should not be permitted to forum shop among countries when it comes to custody of their children. The Hague Convention requires the prompt repatriation of children under 16 years of age who were wrongfully removed by a parent from the country in which they had been living, except in certain very limited circumstances (some of which are discussed in more detail, below). The Convention does not address or permit the alteration of custody rights, even temporarily, though as a practical matter, denying a repatriation petition usually results in physical custody going to the relocated parent (sometimes called the "abducting" or "removing" parent). The treaty contains some limited exceptions to repatriation, and these few exceptions form the basis for much of the Hague Convention litigation in the United States.

The need for the treaty is even greater now than when it first went into effect. The ease and affordability of present day international travel combined with the increasing globalization of business, industry, and education, have created more opportunities than ever for the formation of cross-border families, and along with that, the inevitable increase in cross-border family dissolution. As the number of internationally relocating parents grows, so too grows the number of child repatriation cases under the Hague Convention.

However, the number of lawyers available to handle such cases, especially on behalf of indigent families, has not kept pace. Some parents endure months without representation for cases which the Convention contemplates taking just weeks to complete, resulting in unnecessarily prolonged separations or status uncertainty, and impacting, sometimes permanently, a child's relationship with the left behind parent. Not surprisingly, the situation is more serious for indigent parents, as there is no right to counsel in Hague Convention cases, and the parent who is unable to afford an attorney must seek pro bono counsel (and if they are the left behind parent they must do so from abroad), often while laboring under a language barrier, making access to U.S. counsel and courts even more onerous.

The purpose of this article is to provide a brief overview of the Convention, and urge more child welfare, matrimonial, and pro bono lawyers to consider representing parents (including indigent parents) and children on Hague cases. The subject matter of these cases—the legal rights of children and families—is not so dissimilar from the core work of the state court family law or child welfare professional, even if the cases are generally heard in federal court. Hague child abduction cases are challenging, fast-paced, and profoundly meaningful, and they can also lead to the development of an exciting and rewarding new practice area.

Trying a Hague Case

The Hague Convention on the Civil Aspects of Child Abduction is implemented in the United

States through the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601, et seq. ICARA is brief, containing just eleven sections. Section 11603(d) directs simply that courts "decide the case in accordance with the Convention." Other sections provide for concurrent state and federal court jurisdiction (§ 11603(a)); burdens of proof (§ 11603(e)); and the role of the Central Authority, which is the agency in each country responsible for coordinating requests for assistance from left behind parents (§ 11606). The goal of ICARA is to provide a uniform domestic process for effecting prompt repatriations under the Hague Convention. Courts may not use ICARA to alter physical custody, even by removing a child from the "abducting parent," unless there is an independent basis to do so under state law. ICARA § 7(b). Unless at least one of the exceptions to repatriation is raised, ICARA requires a child's prompt return, plain and simple.

There is no statute of limitations for Hague cases, but as a practical matter, delay, and in particular delay of more than a year, could give rise to two defenses: (a) the Article 12 defense of more than a year having elapsed, during which a child has "settled" into its new environment; and (b) the defense set forth in Article 13 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." The Convention directs that contracting states "shall act expeditiously in proceedings to return children," and notes that if a court cannot reach a decision on repatriation within six weeks from the filing of the petition for return, it may be required to explain the reasons for the delay. Hague Convention Article 11.

Some courts treat the six-week mark as a deadline by which the case must be concluded (and many have done this), but other courts proceed more slowly, sometimes with months or years elapsing before a final decision. Appeals and remands can further delay a final decision. (Expedited stays and appeal procedures are available for counsel who choose to use them, though the Supreme Court recently ruled in Chafin v. Chafin that repatriation pending appeal does not moot an appeal.

There is much room for individual interpretation of the treaty and of ICARA, resulting in a decided lack of uniformity among the federal courts on a number of procedural issues. Some courts expedite the cases and others do not; some courts dispense with formal discovery procedures entirely, others employ, modify, or expedite them; some courts may appoint a guardian ad litem for a child, some provide legal representation for a child, and some provide neither. In this way, every Hague case is procedurally different from the one that came before it. There is even lack of uniformity on some substantive issues, including a circuit split on whether ICARA provides a federal right of action for the enforcement of visitation rights, with the Second Circuit holding that it does (Ozaltin v. Ozaltin, 708 F.3d 355 (2d Cir. 2013)) and the Fourth Circuit holding that it does not (Cantor v. Cohen, 442 F.3d 196 (4th Cir. 2006)).

While ICARA provides for jurisdiction in both state and federal courts, most practitioners choose to file in federal court. Because the bulk of all domestic cases involving children and families most commonly arise in state courts, however, the judges and practitioners most familiar with the

law and social science of at-risk children are found working in state, not federal courts. Additionally, although federal courts generally have lighter dockets, and therefore shorter delays, than do state courts, they also lack ready access to typical family law resources that state courts have come to rely on, such as specialized training, institutional relationships with local child protective agencies and other professionals, a trained and dedicated specialty bar, and on-site or on-call social services to address common risk factors such as domestic violence, drug and alcohol abuse, corporal punishment, housing, and other needs of high-risk families.

In straightforward Hague Convention cases in which no defenses are raised, specialized child protective expertise may never be needed, because the court should order the child's immediate repatriation and any custody proceedings can be handled by the home country upon the child's return. But in practice, when a parent raises a child welfare-like defense to repatriation (think Article 13(b)'s "grave risk of harm"), an otherwise straightforward jurisdiction selection question becomes a quasi-child protective case in federal court. This means that the federal courts must work that much harder to access the same resources that come much more easily to state courts, which handle child protective matters day in and day out. This federal court disadvantage is exacerbated by the Convention's emphasis on expediency, leaving the district court and lawyers little actual time to figure out the best path forward.

Despite this challenge, the federal bench has prioritized Hague cases (as it must), and strives to get them exactly right. One district court held evening sessions. Yaman v. Yaman, 730 F.3d 1, 7 (1st Cir. 2013). Another, in lower Manhattan, opened the courthouse on emergency power the day after Hurricane Sandy, soley for a Hague case. Souratgar v. Fair, 2012 WL 6700214, *1, fn1 (S.D.N.Y. 2012). I have handled three Hague cases, all of which were expedited. To many seasoned child welfare practitioners whose day-to-day caseloads comprise high-need families desperately vying for attention from overcrowded state courts, such singular concern for the welfare of a child is refreshing and affirming.

The Defenses: A Closer Look

As noted, much of the domestic litigation around the Hague Convention centers on three defenses which should, at heart, feel fairly familiar to any child protective lawyer. One defense is that of the mature child who objects to repatriation, and who has "attained an age and degree of maturity at which it is appropriate to take account of its views." Hague Convention, Article 13. Expert testimony or an in camera interview may help the court decide whether this defense has been established.

Another defense is Article 12's "one year plus now settled" provision, which may apply if more than one year has elapsed since the child's wrongful removal or retention, and as a result, the child was permitted to put down roots and build a new and stable life in the United States. The defense seeks to balance the rights of a left behind parent with a child's right not to be uprooted and forced to start over. The Supreme Court recently held that there is no tolling of the one-year period even when a parent concealed the child, underscoring the importance of the question of child settledness. Lozano v. Alvarez, 134 S. Ct. 1224 (2014).

Finally, Article 13(b) provides that repatriation is not required when 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." Unlike the defenses discussed above, which need only be proven by a preponderance of the evidence, "grave risk of harm" must be proven by clear and convincing evidence.

Serious physical abuse, sexual abuse, and extensive or serious domestic violence will constitute grave risk of harm, but neglect, poverty, and mere substandard parenting should not. In the words of the Second Circuit in *Blondin v. Dubois ("Blondin IV")*:

> [A]t one end of the spectrum are those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child's preferences; at the other end of the spectrum are those situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation. The former do not constitute a grave risk of harm under Article 13(b); the latter do.

The courts are careful to differentiate the risk of harm presented by a particular parent from a risk of harm presented by repatriation to the jurisdiction generally. Whenever possible, a child should be returned to the home jurisdiction, even if the child is to reside in the care of extended relatives, foster care, or even the removing parent, once he gets there. In Blondin IV, however, the Second Circuit concluded that the extensive history of violence witnessed and experienced by the children before they fled to the United States with their mother prevented the children's return to France under any circumstances, so great was their trauma.

The "grave risk of harm" inquiry is one in which the skills and experience of child welfare lawyers are transferrable to, and welcomed by, the district court. A family's social history, expert psychological testimony, and other evidence of family functioning and child safety may be needed to prove this defense. This is all highly familiar territory for the experienced child welfare professional.

There are also other, less commonly litigated defenses, such as consent or acquiescence to the child's removal (Article 13), the failure of the petitioning parent to establish that she was exercising her custody rights at the time of the wrongful removal (Articles 3, 13), and the defense that that repatriation would violate public policy and shock the conscience (Article 20). Counsel should obviously explore the applicability of all available defenses.

Hague Cases and You (Yes, You)

So, why should you care about the Hague Convention? Because you are needed in federal court. Not only do federal courts lack the day-to-day experience of serving at-risk families and children, there are also no specific federal rules (other than the skeletal instructions set forth in ICARA) governing Hague cases, there is no right to counsel for the parents or child(ren), and

many federal court practitioners are unfamiliar with the specialized needs of court-involved families. (In one case, the respondent incorrectly assumed she had an immigration problem and retained immigration counsel, who was familiar with neither federal trial practice, nor matrimonial law /child protection.) But an experienced child welfare lawyer, with direct experience in cases involving abuse, neglect, abandonment, visitation, substance abuse, domestic violence, mental illness, corporal punishment, education, etc., can make a big difference in a case in which a respondent invokes one or more defenses to repatriation.

Much of the domestic litigation of Hague cases centers on the defenses discussed briefly above. But it is the Article 13(b) "grave risk of harm" defense in which the skills and expertise of the child welfare professional are most needed, and are also most transferrable. The child protective nature of the grave risk of harm defense should be familiar territory for any child welfare attorney.

These cases are also ideal for law firms seeking pro bono matters for associates, perhaps in conjunction with local child protective lawyers. Hague cases are highly litigious, virtually guaranteeing a hearing and all of the valuable trial preparation that comes with it. There is ample opportunity for direct client contact. The cases are not document-heavy. They are usually concluded relatively quickly (many cases are measured in weeks or months, not years), and will not result in protracted entanglement or years of supplemental petitions: either the repatriation request is granted or it is not, and in some cases an appeal and remand follows. But once the case is done, it is done, and there are no further proceedings to be had. They are not overly expensive: there may be costs associated with interpretation and translation, or with overseas witnesses, but some costs may be recoverable from the district court's pro bono fund, if available, and counsel can make the appropriate inquiries before accepting assignment.

Representing Parents

As noted earlier, left behind parents face enormous obstacles in seeking judicial intervention in the United States to compel return of their children. There is no right to counsel under ICARA, so parties who wish to be represented must hire and pay for lawyers themselves. Hiring a lawyer in the United States from another country poses obvious logistical challenges, and those challenges are compounded when the parent does not speak English. When a parent is indigent, he must seek pro bono counsel, and the situation complicates further. Representing parents in Hague cases is a perfect opportunity for the skilled child welfare lawyer.

Representing Children

Raising a defense to repatriation often prompts a federal court to appoint a guardian ad litem (GAL) to represent the interests of the child. This is precisely because the court values information about the functioning, safety, and opinions of the child—something a child welfare lawyer can provide. There are no published standards or guidelines for GALs on Hague cases, and the role of the GAL on a particular case is circumscribed entirely by the appointing court. A GAL should ensure that facts and arguments relevant to the disposition of the case, and which are therefore critically relevant to the child's interests, are brought to the court's attention. GALs

have been tasked with different roles, including assisting the court in making a grave risk analysis, reporting on a child's maturity in connection with the defense of objection to repatriation, presenting evidence on how "settled" a child may be under an Article 12 defense (including testifying to the results of interviews and investigations), facilitating visitation or phone calls, attending in camera interviews, etc. In one of my own cases, as GAL I appeared as amicus curiae on the appeal. Souratgar v. Lee, 720 F.3d 96 (2d Cir. 2013).

By contrast, some courts have addressed the need for information by assigning an attorney to litigate a child's interests. In another of my cases, the Southern District of New York granted intervention to the child, who then became a party to the case. Jakubik v. Schmirer, 2013 WL 3465857 (S.D.N.Y. 2013). The Fifth Circuit also recently remanded a case for assignment of a GAL in contemplation of the children's possible intervention. Sanchez v. R.G.L., 743 F.3d 945 (5th Cir. 2014). A GAL, attorney, next friend, or other representative for the child must ensure that the child's rights and interests are protected, however that is to be accomplished within the bounds of a particular appointment. In the absence of court-assigned counsel it should also be possible, at least in theory, for a child to independently retain counsel and seek to intervene in the proceedings on her own initiative. However it comes about, though, Federal Rule of Civil Procedure 17(c) governs the participation of minors in federal litigation, and compliance with this rule must be satisfied.

How to Get Started

A good way to get started on Hague cases is to contact the Civil Division of the Department of Justice, Office of International Judicial Assistance, which acts as the Central Authority for Hague cases in the United States, and helps secure counsel for left behind parents. The International Child Abduction Attorney Network (ICAAN) is another clearinghouse for lawyers who wish to accept Hague case referrals. Attorneys can also contact the pro se law clerk at their local federal courthouse and volunteer to accept referrals for Hague cases; this office is often the first stop for respondents, and is therefore the place where attorneys who wish to defend Hague cases might start. Attorneys can also offer to accept referrals on behalf of the children this way, and can also contact the National Center for Missing and Exploited Children, which has worked closely with the State Department on Hague cases, and asked to be placed on a referral list.

Conclusion

Hague cases are exciting, demanding, and—not unlike traditional matrimonial and child protective cases—emotionally charged. (In Blondin III, the French authorities questioned whether the district court viewed them as "undercivilized monkeys or responsible partners to an international convention." Blondin v. Dubois, 78 F.Supp.2d 283, 299 (S.D.N.Y. 2000).) Hague cases move quickly, sometimes going from petition to repatriation in just six weeks. They provide excellent pro bono opportunities, and opportunities for gaining federal court litigation experience. Many of the skills needed are those which the child welfare lawyer has already perfected in state court. And Hague cases are rewarding, providing the opportunity for lawyers to make a meaningful difference in the life of someone's son or daughter, mother or father. There is

no greater reason for being a lawyer than having the ability to make a real world difference in the lives of your clients, and Hague cases provide that immediate opportunity.

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