Hague Convention – International Child Abduction and Prevention

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History of Hague Convention

- Treaty signed at the Hague in October 1980
- US became a signatory in 1981
- Effective for US in December 1983
- US enacted the implementing legislation in July 1988
- Currently, there are 103 countries or territories who have ratified, acceded to, or otherwise became parties to the Convention

Purpose of Hague Convention

- To secure the prompt return of children wrongfully removed to or retained in any Contracting State
- Prevent forum shopping for more sympathetic venue
- To ensure that possession and access rights under one of the Contracting States are respected in other contracting states

Remedy – return of child to “home state”

Prima Facie Hague Case

- Proof of wrongful removal or retention: at the time of the removal or retention, there was a custody order in the child's habitual residence
- Possession rights were being actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention

Habitual Residence

- No specific definition provided in the Convention
- Defined by case law
- Determined at the point in time before the removal or retention
- Test pursuant to *Monasky v. Taglieri*: totality of the circumstances (SCOTUS)

What a Hague Case is NOT

- NOT a child custody dispute
- NOT a best interest dispute
- NOT a parent's fitness
- NOT a final determination as to child's residence

Additional Information

- Only applies while the child is under 16 years old
- Application is filed with the Contracting State's "Central Authority"
- In United States, it can be filed in either state or federal court
- Burden of proof for elements is preponderance of the evidence



Additional Information

- Court considering Hague case only determines where the custody case should be decided – NOT who should have custody or what the schedule should be
- Court must apply foreign law when making a determination
- There is no time limit for filing – can be filed any time after removal or retention in foreign country
- General defense is proper notice of prior court order

Affirmative Defenses

- Well-settled
- Not actually exercising possession
- Grave risk of harm
- Child objects to removal
- Public policy

Affirmative Defense: Well-Settled

- Court shall order return if less than one year has passed from wrongful removal or wrongful retention
- However, if more than one year has passed, affirmative defense is that the child is now settled in the new environment
- Time is not tolled
- Removal or retention of child can be a fact-based determination
- Affirmative defense not available if case is filed within one year of removal/retention

Defense Against Well-Settled

- Changes to physical location
- Location of personal possession and pets
- Passage of time
- Whether the family retained its prior residence or sold before relocation
- Whether the child has been enrolled in school
- The parent's intention at the time of the move (factor, not determinative)
- Whether the child has established relationships in new location

Affirmative Defense: Not Actually Exercising Possession

- This is a fact-based determination, not a question of law
- Very low bar – doesn't need to even be "regular" periods of possession
- *Ne exeat* – right to object to child's removal
  - Even this will meet the burden of exercising possession
- Under 5th Circuit, basically anything over abandonment

Affirmative Defense: Grave Risk

- Exposing child to a grave risk of physical or psychological harm
- Not a comparative lifestyle defense
- Ordinary hardship = not enough
- Grave risk can include abuse of child or exposure to domestic violence in some cases

Defense Against Grave Risk

- If Court finds grave risk, the Court may consider if measures can be taken to reduce the risk so that child may be returned
- This is optional, not mandatory – court is not obligated to consider all possible ameliorative measures
- Measures must *actually* mitigate risk (specific to what was found in the grave risk affirmative defense)
- Examples can be supervised possession, protective orders, etc.

Affirmative Defense: Child Objects

- Court may refuse to return the child if there is a finding that the child objects to being returned
- Child must be determined to have attained an age and degree of maturity as which it is appropriate to take account of their views
- Preponderance of the evidence

Affirmative Defense: Public Policy

- Relating to the protection of human rights and fundamental freedoms
- Requested state (state hearing the Hague case/where child is located) may refuse the recognition or enforcement of a foreign judgment if doing so would violate the fundamental principles of the Requested State relating to the protection of human rights and fundamental freedoms
- Very narrow, rarely used

Grave Risk v. Public Policy

Grave Risk

- Applies to this specific individual child and whether return to habitual residence would expose this child to physical or psychological harm

Public Policy

- Targets systemic violations of public policy or human rights, and is not specific to this individual child

Both grave risk and public policy affirmative defenses require clear and convincing evidence

Practical Application

Evaluating the child's risk factors for international abduction and preventative measures available

Abduction Risk Factors

- Previously concealing the child or threatening to take the child from other parent
- Lack of financial reason to remain in the United States
- History of domestic violence
- Strong family or business ties in foreign country
- History of violating court orders

See Texas Family Code § 153.501 – 153.503



Prevention Measures

- Ordering the parent to post a bond
- Ordering passport controls
- Ordering only supervised visits
- Include specific language in the court order which:
  - Identifies the United States as the country of habitual residence
  - Clearly defines the basis for the court's jurisdiction
  - State penalties for violating the underlying order

Non-exhaustive list – learn your client's facts!

Order Language

THE PARTIES AGREE and IT IS ORDERED that the State of Texas, United States of America is the state and country of [children]'s habitual residence for any enforcement proceedings under the Hague Convention on Civil Aspects of International Child Abduction. IT IS FURTHER ORDERED that any costs associated with enforcing the terms of this agreement and subsequent order under The Hague Convention, including but not limited to travel costs and lodging for the other parent conservator to travel to retrieve the child from any country not the habitual residence for the child shall be assessed 100% against the parent conservator found to be in violation of this agreement and subsequent order.

Secondary Prevention Measure: Cost

If Court orders the child to be returned, the Court is required to order the Respondent to pay:

- Necessary expenses incurred by or on behalf of the Petitioner
- Can include:
  - Court costs
  - Legal fees
  - Foster home fees
  - Transportation costs associated with return of the child (unless clearly inappropriate)

Other Remedies - Not Return

- Central Authority may assist "left behind parent" to get agreements related to rights of access (visitation) rather than a return to the habitual residence
- Under Texas law, can seek enforcement of custody orders of other country
  - MUST register foreign order in Texas first

Hague Application and Case Procedure

I've been retained on a Hague case – what do I do now?

Initial Actions

- File an Application for Return with the United States' Central Authority (United States State Department)
- Receive a copy of the Application from Central Authority
- File the court case in either state or federal court

Next Steps

- Serve the Application
  - Follow Texas Rules of Civil Procedure
  - In some circumstances, may use the United States Marshalls for service
  - Otherwise, follow Hague Convention regarding service procedures
- Prepare for hearing
- Court may order the parties to mediate prior to hearing

Take Aways

- Hague cases are jurisdictional, and NOT BEST INTEREST
- Elements of a Hague case are that the person who is seeking the return of the child must have a custody order which is currently in place and must be exercising possession of the child
- Exceptions to removal include: child is settled in new environment, parent seeking return did not have possession rights or was not exercising their periods of possession, grave risk of return, child objects, and public policy defense

QUESTIONS

