

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION:

A CURRICULUM FOR AMERICAN JUDGES AND LAWYERS

by: Patricia M. Hoff, Legal Director

Obstacles to the Recovery and Return of Parentally Abducted Children Project

American Bar Association

Center on Children and the Law

Washington, DC 20005

October 1997

This curriculum was written under grant 93-MC-CX-0002 from the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, to the American Bar Association Fund for Justice and Education. The official grant title is "Obstacles to the Recovery and Return of Parentally Abducted Children: Training, Technical Assistance, and Product Resources." The project is directed by Dr. Linda Girdner at the ABA Center on Children and the Law.

Points of view or opinions in these materials are those of the author and do not necessarily represent the official position of the Department of Justice.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and accordingly, should not be construed as representing the policy of the American Bar Association.

The contents of this curriculum may be adapted and reprinted without permission. However, proper attributions and disclaimers must be made including the three above paragraphs and identifying Patricia M. Hoff as the author.

1997 American Bar Association ACKNOWLEDGMENTS

Writing this curriculum was essentially an organized outpouring of much of what I have come to know about the Hague Child Abduction Convention and its operation in the U.S. and abroad. What I know, and what I set out to share with judicial and legal educators in this curriculum, is the product of my many years in the field of international child abduction law and the opportunities I have had to learn from some of this country's experts. I recognize the following people for their influence on my understanding of the Convention: Bob Arenstein, Hon. Danny Boggs, Carol Bruch, Gloria DeHart, Adair Dyer, Hon. Jim Garbolino, Bill Hilton, Jerry Nissenbaum, Peter Pfund, and Linda Silberman. To these colleagues, and many others whose opinions, articles, and lectures have been instructive, I extend my thanks.

Two colleagues deserve special mention. Linda Girdner is a giant in the field of interstate and international family abduction. It has been my privilege to serve as legal director of the Obstacles Projects that she has so ably directed at the ABA Center on Children and the Law with funding from the

Office of Juvenile Justice and Delinquency Prevention. Her ground breaking research on risk factors for parental abduction is the core of the prevention chapter in this curriculum. It has been my good fortune to co-direct judicial seminars on the Hague Child Abduction Convention with Linda; I can only hope that her dynamic presentation skills and organizational talents have rubbed off.

Finally, I gratefully acknowledge Mike Medaris, OJJDP grant monitor of the Obstacles to the Recovery and Return of Parentally Abducted Children: Training, Technical Assistance, and Product Resources Project, for his support of this curriculum. It is part of an array of products and services the Missing Children's Program at OJJDP, under the leadership of Ronald Laney, has developed to improve practice under the Hague Child Abduction Convention in the United States.

TABLE OF CONTENTS

Acknowledgments

Introduction Page 6

Chapter 1. Curriculum Objective Page 11

Chapter 2. Program Format Page 15

Chapter 3. Room Set up. Page 17

Chapter 4. Faculty Page 19

Chapter 5. Sample Agenda. Page 23

Chapter 6. Detailed Seminar Description. Page 25

Chapter 7. Written Materials for Participants Page 29

Chapter 8. Training Modules: Lesson Plan Page 31

Lesson Plan 1 Overview of the Hague Child Abduction

Convention and ICAR Page 33

Lesson Plan 2 Trying a Hague Return Case in the

United States. Page 43

Lesson Plan 3 Access Cases Page 69

Lesson Plan 4 Small Group Role Play: Trying A Hague

Case - From Theory to Practice Page 77

Lesson Plan 5 Identifying and Protecting Children at

Risk for Abduction. Page 85

Lesson Plan 6 Convention Wrap-up and Problem Page 99

Solving

Lesson Plan 7 Case Study of the Friedrich v Friedrich

Litigation Page 105

Chapter 9. Participant Feedback Questionnaire Page 111

Chapter 10. Appendices. Page 115

Appendix 1 Overheads

Appendix 2 Resources

Appendix 3 Trying a Hague Return Case - From Theory to Practice

Appendix 4 Hague Convention on the Civil Aspects of International Child Abduction: Text and Legal Analysis

Appendix 5 International Child Abduction Remedies Act

Appendix 6 Friedrich v. Friedrich: A Case Study

INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction was adopted in 1980 at the Fourteenth Session of the Hague Conference on Private International Law. The Convention, also referred to as the Hague Child Abduction Convention, reflects the Hague Conference view that international child abduction is a global problem in need of a coordinated international response. The opening paragraphs of the Convention capture not only the purpose of the Convention, but the principle that guided the drafting process, i.e., the desire to protect children internationally from the harmful effects of their wrongful removal or retention.

The harmful effects of family abductions on children have been documented. It is not hard to imagine the turmoil, disruption, loss of trust,

fear, anger and sadness a child must feel when he is taken, perhaps surreptitiously or even violently, from a familiar home in one country, to another country whose language and culture are foreign to him. A child who travels abroad with the expectation of returning home, but who is then kept abroad by a parent who decides not to return, might experience the same reactions. In both situations, the child is cut off from his other parent. To compound the trauma, sometimes the child is told that the other parent is dead or no longer loves him.

The harm to a single child, magnified thousands of times to reflect the estimated number of children who are the victims of wrongful removal or retentions worldwide every year, crystallizes why the Hague Conference devoted itself to formulating law and procedure to secure the prompt return of children to their home countries, and to ensure protection for rights of access. And it also explains why 48 countries have either ratified or acceded to the Hague Convention on the Civil Aspects of International Child Abduction, with the prospect -- and hope -- of additional countries becoming treaty partners in the future.

The United States played an active role in developing the Hague Child Abduction Convention. Our interest in crafting a remedy for international child abduction cases coincided with numerous domestic initiatives, at both the state and federal levels, addressing the problems of interstate parental kidnapping. The United States ratified the Hague Child Abduction Convention in 1986. It took effect in the U.S. on July 1, 1988, following enactment of the International Child Abduction Remedies Act (ICARA). ICARA provides uniform procedures for implementing the Convention nationwide.

Despite the availability of the Hague Convention remedy in the U.S. for nearly a decade, few lawyers and judges are familiar with it. A congressionally-mandated study, conducted by the ABA Center on Children and the Law for the U.S. Department of Justice, found that lack of knowledge of applicable law and lack of experience using such law on the part of many attorneys and judges were major obstacles to the recovery and return of parentally abducted children.

Lack of knowledge of the Hague Child Abduction Convention was found to be a significant problem. Three-fifths of the judges responding to a survey said that counsel rarely or never adequately informed them about the Hague Convention. Essentially the same percentage of attorneys said that judges were not familiar with the Convention. Even more attorneys -- nearly 70% -- reported that opposing counsel was not familiar with the Hague Convention.

The Obstacles Project Final Report recommended continuing education and training for judges and attorneys in laws applicable to parental abduction. This curriculum was created in response to the recommendation in that report. It was developed to help educators provide much-needed training on the Hague Convention to lawyers and judges in the United States.

Training is the best way to ensure that Hague remedies are implemented effectively in this country. Children abducted from the U.S. stand to gain as much from a legal community versed in the Convention as children abducted to the U.S. If courts in the U.S. honor their treaty obligation and order the return of wrongfully removed and retained children to their home countries, foreign courts are more likely to send abducted children back to America.

ENDNOTES

Chapter 1. CURRICULUM OBJECTIVES

What it covers. This curriculum covers the use and interpretation of the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act. The focus is on the operation of the Convention in the United States, that is, on handling incoming cases. These involve children who are wrongfully taken to, or kept in, this country. Less attention is given to the role of the U.S. practitioner in handling outgoing cases. These involve children who are wrongfully removed from the U.S. and kept in another country.

Target audience. The curriculum is designed for training judges and lawyers. It is appropriate for training federal as well as state court judges, since there is concurrent federal-state jurisdiction over Hague cases.

Use of this curriculum should not be limited to lawyers or state court judges who specialize in family law matters, as Hague cases are not really custody cases at all. When given an option, lawyers may file return cases in courts of general jurisdiction, preferring to avoid family or juvenile and domestic relations courts which may be more inclined to delve inappropriately into the merits of the underlying custody dispute. Consequently, courts of general jurisdiction need to know about the Hague Convention.

Similarly, lawyers in many practice areas of law should receive training on the Convention. Family lawyers are the most obvious group of practitioners who would benefit from continuing education. However, the curriculum is suitable for delivery to lawyers in general, corporate, litigation, international and other practices areas as well.

The principle reason for presenting curriculum to lawyers in these diverse practice areas in addition to the family law bar is to expand the number of informed practitioners potentially available to represent foreign parents in Hague cases brought in the United States. This is a goal of the U.S. Central Authority, which expends tremendous time and effort looking for lawyers willing to provide pro bono or reduced-fee representation to parents seeking the return of their children from the United States under the Hague Convention. The national interest is served by matching foreign applicants

with attorneys in the U.S., as this fosters reciprocal help for American parents in need of legal help abroad.

Lawyers who would not normally encounter a child abduction case should be introduced to this relatively new and developing practice area. Some may welcome the chance to influence the development of the law. Others may see the Convention as a unique opportunity to do some humanitarian good for a child in crisis without the complications of full-blown custody litigation.

Primary goal of the curriculum. This curriculum is designed to provide lawyers and judges with in-depth training on the Hague Convention with the overall goal of improving its operation in the U.S. Otherwise stated, the primary mission of this curriculum, and educational programs that follow it, is to raise the level of knowledge lawyers and judges have about the Hague Convention and ICARA remedies in the U.S.

In addition, there are curriculum objectives specific to the two audiences targeted for training.

For lawyers, this curriculum should:

prepare them to recognize when an international abduction or retention case falls within the Convention so that a Convention remedy can be pursued, assuming this is consistent with the client's goals. Attorneys should understand the elements of the case for return, and should anticipate defenses that may be raised. Attorneys should recognize the kinds of assistance available from the U.S. Central Authority so that appropriate help may be requested.

apprise them of defenses to return that may be available within the framework of the Convention. Lawyers for petitioners need to know and anticipate defenses that may be raised to their requests for return. Respondents' counsel must also be familiar with defenses: Ignorance of the limited exceptions to the return obligation under the Convention may deprive the respondent-parent of a meaningful opportunity to contest the return petition.

For judges, this curriculum will:

emphasize that Convention cases are not substantive custody cases, a distinction with both practical and legal import

convey the importance of promptitude in deciding cases

explain the legal authority under ICARA to order provisional remedies in appropriate cases to safeguard children at risk of harm or re-abduction

inform federal and state court judges of their concurrent jurisdiction to hear Hague cases.

ENDNOTES

Chapter 2. PROGRAM FORMAT

The proposed curriculum is for a half-day program, i.e., four instructional hours. It can be shortened by deleting select training modules or by abbreviating content. An optional case study module is included should there be an extra hour of instruction time. An optional catered group luncheon is included. It is only recommended if it follows the substantive program, i.e., if the seminar is presented in the morning.

The format is a combination of plenary sessions and interactive small and large group activities.

There are five short lecture sessions. Short lectures are the most suitable vehicle to communicate basic principles of law and policy. Interspersed with the lectures are breaks, group deliberations, and an interactive wrap up/questions and answers.

Participants will have two opportunities to cement comprehension about presenting and trying a Hague case. The first is a small group role play designed to give participants practice applying the new information. The audience will be divided into three groups, each assigned to analyze a case hypothetical from the perspective of either the petitioner, respondent, or judge. The petitioner's group will present the case for return, followed by respondent's arguments in opposition to return. The judge's group will make appropriate rulings and orders, and will comment on case management issues. General discussion will follow. If the group is large, two break out rooms will be needed as a complement to the main meeting room. A small group can use the round tables in the main meeting room for their deliberations.

The program concludes with a wrap-up/questions and answers session for the entire group. Miscellaneous issues will be discussed using a question and answer format. In addition, questions and case hypothetical submitted to the moderator, on index cards distributed for that purpose at the start of the session, will be discussed. If the group is large and there are at least three faculty, this session can be broken into two parts: the wrap-up for the entire group, and then smaller group question and answer sessions, moderated by faculty seated with each group. This works well at round tables.

A group luncheon, if feasible, would provide a third opportunity for dialogue and networking. This is discussed below.

An optional module is an interactive recap activity. The audience would split into four groups at random. Each group would be given one part of the Friedrich case to summarize and critically analyze. Each group would present its summary of

the litigation, which will provide a complete picture of the epic case. The floor will then be open for discussion of the substantive and procedural issues raised by the case. If the group is large, three break out rooms and the main room would be needed. A small group could meet in the main meeting room at the round tables. Flip charts should be available to each group.

A word about breaks. The value of networking among lawyers and judges interested in Hague proceedings cannot be overstated. Two breaks and an optional luncheon are suggested to facilitate networking. It is a good idea to provide coffee and continental breakfast for at least a half hour before the seminar begins. (This gives registrants an incentive to arrive early, and helps ensure that the program will start on time.) A mid-morning break is recommended. Finally, an optional group luncheon-in-the-round is proposed to follow conclusion of the program. Depending upon the number of faculty and seminar participants, a faculty member will either be at each table or float between tables, to facilitate discussion and answer questions.

Chapter 3. ROOM SET UP

Speaker's table

This should be on a raised platform in the front of the room. There should be a lectern with microphone for faculty who prefer this method of presentation. At least one table microphone should be set up on each side of the lectern. A livelier microphone should also be available for speakers who prefer to rove. Faculty name placards should be large enough to be read throughout the room.

Audience seating

If the audience does not exceed one hundred, round tables for 10 (set to accommodate 8) are suggested. This lends an air of intimacy that classroom style often lacks, especially when the room is larger than the audience and people scatter themselves to the far reaches of the space.

Moreover, round tables are conducive to the proposed small group activity. This would be an alternative to breaking out into three separate rooms. Audience size, available space and budget will dictate whether 3 break out rooms should be reserved.

If the number of registrants exceed one hundred, plan on classroom style, but be sure not to set too many more seats than are necessary. Encourage people to sit in the rows closest to the speaker's podium. In the event of a large audience, two small break out rooms will be needed to accommodate the small group activity. (Three small break out rooms will be needed if the optional case study module is presented to a large group.)

Teaching aids

An overhead projector, screen, transparencies and markers will be needed in the main meeting room. It is helpful to have an assistant or another trainer place the transparencies on the projector, so that the speaker does not have to undertake that task while teaching.

A flip chart and marking pen should be set up on the podium.

If break out rooms are used for the group activities, each one should be set up with a flip chart, marking pen (or an overhead projector with blank transparencies and marker), and masking tape. If the small group meetings will take place in the main meeting room, flip charts should be dispersed throughout the room.

Each place should be set with a small pad and pen or pencil. Water and glasses should be set up on the tables.

Index cards should be placed on each table. Registrants will use these to submit questions and hypotheticals for the wrap-up session. Chapter 4. FACULTY

Size

It is recommended that there be at least one lawyer and one judge on the faculty for a training program that uses this curriculum. This can include the moderator, who would also serve as a substantive presenter. If the program is uniquely for judges, having at least one judge on the faculty should be a priority. If cost is not a consideration, adding one or two additional speakers will offer more perspective and variety to the course.

Will the program succeed if only one presenter is available? The answer depends upon who the presenter is. If the person is conversant with the Convention and ICARA, and skillful at varying the manner of presentation, the seminar could certainly work.

Finding outstanding faculty

The profile of the ideal faculty member is a prominent judge or lawyer, known to the audience, who has handled one or more Hague cases and developed a recognized expertise. Finding this person can present a challenge, however, given the relative lack of experience most lawyers and judges have with Hague cases. Suggestions for finding suitable presenters follow.

Look for local expertise:

Lawyers. A local lawyer who has lectured to national audiences on the Hague Convention would fit the profile. Check with the State and Local Bar Association, Family Law Sections, for help identifying such a practitioner. The American Bar Association Section on Family Law, the American Academy of Matrimonial Lawyers, and the International Academy of Matrimonial Lawyers also may be good sources for referrals to state or local experts.

Judges. A judge whose Hague opinions have been published and cited with approval may be an excellent choice for a faculty slot. Remember, federal judges should also be considered as presenters. They have concurrent

jurisdiction over Hague cases and are responsible for numerous highly-regarded opinions throughout the country.

The last comment suggests another means of identifying knowledgeable presenters: check the Hague Convention case law in your state and federal circuit for names of lawyers and judges who have handled and decided Hague cases. Knowledge of the subject and ability to teach do not necessarily go hand in hand. Therefore, it is important to ask whether the faculty member you are considering has experience presenting at seminars.

Consider inviting national experts:

What if you cannot find presenters in your locality or state? This is a real possibility, given the relatively small number of Convention cases in most jurisdictions. If the training budget can afford out-of-state expert presenters, consider inviting one or more nationally known experts on the topic. The bar associations mentioned above are good sources of referrals to nationally (and internationally) recognized experts on the Hague Convention. Also consider the following sources for identifying high quality speakers.

Faculty from other programs. Since the Hague Convention came on the legal scene, several major national and international conferences have taken place. For instance, a full-day pre-conference judicial institute on the Hague Convention was presented in June 1997 in conjunction with the Second World Congress on Family Law and the Rights of Children and Youth. A half-day institute on the Hague Convention took place in 1995 at the annual meeting of the Association of Family and Conciliation Courts in Montreal. In 1993, the North American Symposium on International Child Abduction convened in Washington. These seminars had extraordinary faculties from the U.S. and abroad. The presenters from these sessions could also be candidates for other educational programs.

Law professors. Law professors who have published on the Hague Convention should also be considered.

Social scientists. There are several nationally recognized social scientists who have studied the impact of abduction on children, as well as risk factors for abduction. The American Bar Association Center on Children and the Law can provide referrals to these individuals.

Government officials. The United States Central Authority under the Hague Convention is the Department of State, Office of Children's Issues. A representative of that office may be available (perhaps at government expense) to talk about the Convention. The U.S. Central Authority should also be able to suggest speakers from the private sector. In addition, the National Center for Missing and Exploited Children, which processes incoming Hague cases on behalf of the U.S. Central Authority, may also be able to provide or suggest a speaker.

Consider foreign experts for the faculty:

Foreign experts can enrich a training program on the Hague Convention. They come armed with applicable foreign precedent that might otherwise be inaccessible to many U.S. judges and lawyers. Check the faculty rosters of the judicial institute at the Second World Congress, the 1995 Association of Family and Conciliation Courts program in Montreal, and the North American Symposium on the International Child Abduction, described above, for outstanding foreign experts.

Training in border states may be enhanced by the participation of a spokesperson from the Central Authority in the neighboring country (e.g., Mexico or Canada) or a member of their consulate who is familiar with the Convention. The foreign perspective would be particularly meaningful if the program covers how requests for return are handled abroad. (This topic is not on the proposed curriculum, which focuses entirely on using the Convention in proceedings brought in the U.S.) The U.S. Central Authority maintains a current list of all foreign Central Authorities.

ENDNOTES

Chapter 5. SAMPLE AGENDA

7:00 - 8:00 a.m. Registration

7:30 - 8:00 a.m. Coffee and Continental Breakfast

8:00 - 8:15 a.m. Welcome and Faculty Introductions

8:15 - 8:45 a.m. Overview of the Hague Child Abduction Convention and ICARA

8:45 - 9:45 a.m. Trying a Hague Return Case in the U.S.
The Petitioner's Case for Return
The Respondent's Case: Defenses to Return
The Judge's Role

9:45 - 10:00 a.m. Access Cases Under the Hague Child Abduction Convention

10:00 - 10:15 a.m. Break (distribute Participant Feedback Questionnaires)

10:15 - 11:15 a.m. Small Group Role Play: Trying a Hague Case - From Theory to Practice

11:15 - 11:45 a.m. Identifying and Protecting Children at Risk for Abduction

11:45 - 12:15 p.m. Convention Wrap-Up & Problem Solving

12:15 p.m. Closing remarks (Collect questionnaires)

OPTIONAL

12:15 - 1:30 p.m. Group luncheon-in-the-round with faculty

1:30 - 2:30 p.m. Case study of the Friedrich litigation
Chapter 6. DETAILED SEMINAR DESCRIPTION

Registration

Each registrant will receive written materials and a name tag. (Be sure the lettering is large enough to read.)

Welcome and Faculty Introductions

All faculty members will be introduced at the beginning of the program. The objectives of the seminar will be stated. (See Chapter 1. Curriculum Objectives).

Overview of the Hague Child Abduction Convention and ICARA

This half-hour presentation is an introduction to the Hague Convention and the federal statute that implements it in the U.S., the International Child Abduction Remedies Act (ICARA). Legislative history will be summarized, including the number of countries now party to the Convention. The purpose of the Convention will be clearly stated. The children protected by the Convention will be identified. The remedies for wrongful removal or retention cases will be distinguished from access cases. The duties of the Central Authority will be explained, and administrative processing of return applications will be distinguished from legal proceedings for return. The treaty obligation to return will be emphasized, as will be the discretionary nature of exceptions, even when proved. Incoming and outgoing cases will be distinguished, with an important note to the audience that this program focuses on handling incoming cases in the U.S. That the Convention is not an exclusive remedy will be discussed.

Trying a Hague Return Case in the United States

Part #1. The Petitioner's Case

The first part of this presentation is a detailed explanation of the cause of action for return under the Hague Convention, and how it must be presented and proved in the United States under the Convention and ICARA. All discussion relates to the basic question: What constitutes a wrongful removal or retention of a child within the meaning of the Hague Convention? Key concepts to be discussed include "habitual residence," "breach of custody rights" and "actual exercise of custody rights." Important case law is highlighted.

Part #2. The Respondent's Case

The second part of this session is a detailed explanation of the exceptions to return permitted by the Convention, emphasizing the court's discretion to order return at any time. The Convention does not apply if (1) the child is 16 years or older (Article 16); (2) the child is not removed from or retained in a contracting state (Article 16); (3) the Convention had not entered into force in both Contracting States at the time of the wrongful removal or retention (Article 35).

Convention defenses to be covered are: Article 3 (not a wrongful removal or retention, i.e., not in breach of custody rights arising under the law of the habitual residence); Article 12 (a year has elapsed and child is settled in its new environment); Article 13a (petitioner not actually exercising custody rights, or acquiescence/consent); Article 13b (grave risk of harm/ intolerable situation); Article 13 (mature child objects to return); Article 20 (return not permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms). Burdens of proof established by ICARA are reviewed. Important case law is identified.

Part #3. The Judge's Role

The third part of the session examines the court's role in hearing the case. The discussion covers Article 11 of the Convention (prompt decisionmaking); Article 14 (authorization to take judicial notice of the law of the child's country of habitual residence); Article 15 (court may request applicant to obtain decision from authorities in habitual residence concerning wrongfulness of removal or retention); Article 16 (stay of custody proceedings pending return decision under Hague Convention); Article 17 (custody order from requested state not a ground for refusing return); Article 18 (court may order return at any time); Article 19 (return decision not on the merits of custody); Article 23 (no legalization or other authentication may be required); Article 26 (order payment of attorneys fees and related costs and expenses); Article 30 (admissibility of documents). It also covers ICARA's provisions on burdens of proof, admissibility of evidence, awards of attorneys' fees and other expenses, and provisional remedies. Finally, the return order is discussed (return to person vs. return to habitual residence; undertakings).

Access Cases

The right of return is not available when there is a breach of access rights, a term that is defined in the Convention. The remedies for breach of access are set forth in Article 21. They are described in this short session. A key concept that will be taught is that noncustodial parents may have rights of custody within the meaning of the Convention for which return may be sought. The UCCJA enforcement remedy as an alternative in visitation cases will be discussed.

Break

This is another networking opportunity. The Participant Feedback Questionnaire should be distributed before the break.

Small Group Role Play: Trying a Hague Case - From Theory to Practice

The purpose of this interactive module is to give attendees an opportunity to apply what they have learned. The audience will be divided into three groups, each assigned to analyze a case hypothetical from the perspective of either the petitioner, respondent, or judge. The hypothetical will be included in the handouts. The petitioner's group will present the case for return, followed by respondent's arguments in opposition to return. The judge's group will make appropriate rulings and orders, and will comment on case management issues. General discussion will follow. Depending on the size of the audience, the main meeting room or three

small break out rooms will be used for this exercise. Flip charts will be available to each group.

Identifying and Protecting Children at Risk for Abduction

This module emphasizes the need to be alert for indicators of parental abduction, and for lawyers and judges to fashion appropriate safeguards. Preventing abductions is the paramount goal. Profiles of risk abduction are examined, and specific interventions to prevent abductions are described.

Convention Wrap-up & Problem Solving

This is the chance to address "loose ends" (e.g., the role of the lawyer, judge and Central Authority in outgoing Hague cases; undertakings; non-Hague remedies in international abduction cases, specifically, the UCCJA in incoming cases, and the International Parental Kidnapping Crime Act in outgoing cases), to discuss case hypotheticals submitted by audience, and to answer participant questions. Index cards will be available to participants throughout the program. Questions and hypotheticals can be submitted throughout the seminar to the moderator for discussion during this session.

Closing remarks

Reminder to please return Participant Feedback Questionnaires.

OPTIONAL

Group luncheon-in-the-round

If the program concludes at lunch time and a catered group luncheon is feasible, this is an excellent opportunity for additional networking. Depending upon the number of faculty and seminar participants, a faculty member will either be at each table, or float between tables to facilitate discussion and answer questions.

Case study of the Friedrich litigation

This optional module is intended as an interactive recap activity. An hour would be optimum for this exercise, although 45 minutes would suffice. The audience breaks out into four groups, each one assigned to summarize one of the four parts of the Friedrich litigation. Following sequential presentations to the reassembled audience, there will be time for general discussion and critical analysis of the substantive and procedural issues raised by this case.

Chapter 7. WRITTEN MATERIALS FOR PARTICIPANTS

Program participants should be given the following materials when they register:

1. Copies of overheads
2. Resources

3. Case hypothetical (Trying A Hague Case - From Theory to Practice)
4. The Hague Convention on the Civil Aspects of International Child Abduction
5. Legal Analysis of the Convention
6. International Child Abduction Remedies Act (ICARA)
7. [Optional: Friedrich litigation]

These materials are in the Appendix to this curriculum. The disk version of the curriculum includes items 1-3 and citations for items 4-7.

Chapter 8. TRAINING MODULES: LESSON PLANS

This chapter consists of comprehensive lesson plans for the six training modules on the agenda. An abbreviated lesson plan for the optional case study module is also included.

References to overheads appear in the margins of the "Content Outlines." Overheads for each "Content Outline" appear at the end of the Individual Lesson Plans. A complete set of numbered overheads appears in the appendix and should be made into transparencies. LESSON PLAN 1: OVERVIEW OF THE HAGUE CHILD ABDUCTION CONVENTION AND ICARA

Learning Objective:

To introduce lawyers and judges to the Hague Child Abduction Convention and ICARA, so that the Convention is invoked as a remedy in appropriate cases, and interpreted according to its intent.

Recommended Length: 30 minutes

Subject Overview for Faculty

The Hague Convention on the Civil Aspects of International Child Abduction was adopted in 1980 at the Fourteenth Session of the Hague Conference on Private International Law. The Convention reflects the Hague Conference view that international child abduction is a global problem in need of a coordinated international response. It is now in force in 48 countries around the world. The Convention came into force in the United States in 1988 following enactment of the International Child Abduction Remedies Act (ICARA).

The Hague Convention establishes both administrative procedures and legal remedies for the prompt return of children who have been wrongfully removed from or retained outside of their countries of habitual residence. It also seeks to facilitate the exercise of visitation rights across international borders. The Convention seeks to protect children from the harmful effects of parental kidnapping, and reflects a strong desire to deter such conduct.

"The Convention's approach to the problem of international child abduction is a simple one. The Convention is designed promptly to restore the factual situation that existed prior to a child's removal or retention. It does not seek to settle disputes about legal custody rights, nor does it depend upon the

existence of court orders as a condition for returning children. The international abductor is denied legal advantage from the abduction to or retention in the country where the child is located, as resort to the Convention is to effect the child's swift return to his or her circumstances before the abduction or retention. In most cases this will mean return to the country of the child's habitual residence where any dispute about custody rights can be heard."

A less drastic remedy is established for cases involving access rights. There is no right to have the child ordered returned to his or her country of habitual residence. However, under Article 21, a parent may seek assistance from the Central Authority, or may commence a civil action, to organize or secure the effective exercise of access rights.

The presenter's task in this introductory module is to outline these remedies and procedures.

ENDNOTES

CONTENT OUTLINE

I. The Hague Child Abduction Convention: Background

O-1 A. Adopted unanimously in 1980 by 23 member countries of the Hague Conference on Private International Law

1. Stemmed from a proposal in 1976 at a Hague Special Commission Meeting to find a solution to the global problem of international child abduction

- a. The opening paragraphs of the Convention capture not only the purpose of the Convention, but the principle that guided the drafting process, i.e., the desire to protect children internationally from the harmful effects of their wrongful removal or retention.

B. The dual objects of the Convention are stated in Article 1:

- a. to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b. to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

C. Hague Convention in force in 48 countries as of November 1, 1997.

1. "Open" Convention, Article 38

- a. Distinguish ratification from accession

- i. Member countries ratify, and have discretion to accept the accessions of non-member countries, in which case the Convention comes into force between the countries
2. The United States ratified the Abduction Convention in 1986. It took effect in the U.S. on July 1, 1988, following enactment of the International Child Abduction Remedies Act (ICARA).

II. Administrative Procedures and Legal Rights

The Convention establishes both legal rights and administrative procedures to implement its objectives.

A. Administrative procedures

- O-2 1. Every country must designate a Central Authority (CA) (Article 6) to carry out the duties imposed by the Convention (e.g., Articles 7-11, 15, 21, 26-28).
 2. The CA is a government agency set up to help process requests for assistance in incoming and outgoing wrongful removal, retention, and access cases.
- O-3 a. Article 7 directs CAs to cooperate with each other to secure the prompt return of children and to achieve the other objectives of the Convention. The CA is directed to take all appropriate measures, either directly or through intermediaries, to carry out the duties outlined in Article 7.
 - b. An applicant may seek the assistance of the CA in the country of habitual residence, or of the requested country (i.e., the country in which the child is located) but is not obliged to do so. The applicant may choose to bypass either or both CAs and instead commence return proceedings directly in the courts of the requested country. Article 29.

O-4 B. Legal remedies under the Convention

1. Article 12: Right of prompt return

When a child is wrongfully removed or retained within the meaning of Articles 3 and 5a of the Convention, and less than a year has elapsed between the wrongful removal or retention and the commencement of return proceedings, the child is to be ordered returned forthwith unless the court finds one of the limited exceptions to the return duty applies.

2. Article 21: Access rights

Legal proceedings may be brought "with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject." Return of the child is not a remedy in an action to secure the effective exercise of access rights.

III. Implementation in the U.S. - the International Child Abduction Remedies Act (ICARA)

A. ICARA is based on congressional findings that:

- "(1) The international abduction or wrongful retention of children is harmful to their well-being.
- (2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.
- (3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an International agreement can effectively combat this problem.
- (4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions."

O-5 B. ICARA's purpose is "to establish procedures for the implementation of the Convention in the United States"

1. Concurrent jurisdiction in federal district and state courts

O-6 2. Civil action commenced by filing in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time petition is filed

3. Notice must be given in accordance with UCCJA and PKPA

4. Burdens of proof

a. Petitioner

i. removal or retention was wrongful/preponderance of the evidence

- ii. petitioner has access rights/ preponderance of evidence

b. Respondent

- i. Article 13b or 20 defenses/clear and convincing evidence
- ii. Article 12 or other Article 13 defenses/preponderance of the evidence

5. All relevant documents and information admissible without authentication

6. Directs President to designate a Central Authority

C. Legal rights and remedies under ICARA

1. ICARA is in addition to and not in lieu of the provisions of the Convention

2. Provisional remedies

- a. Courts are authorized to take or cause to be taken measures under state or federal law to protect the well-being of the child or to prevent the child's further removal or concealment before final disposition of the petition

- b. State law authority required for pick up order for child

3. Mandatory award of fees and expenses (including court costs, legal fees, foster home or other care during the return proceeding, and transportation expenses) "unless clearly inappropriate" upon ordering return of child

D. Proceedings under Convention and ICARA are not on the merits of the underlying custody dispute.

Convention proceedings for the return of a child have one goal: to promptly restore the child to the factual situation that existed prior to the wrongful removal or retention. In most cases this will mean return to the country of the child's habitual residence where any dispute about custody rights can be heard and settled.

E. Convention and ICARA remedies not exclusive

ENDNOTES

LESSON PLAN 2: TRYING A HAGUE RETURN CASE IN THE UNITED STATES

Learning Objectives:

1. Generally, to understand how an incoming case for the return of a child abducted to, or wrongfully retained in, the United States is litigated under the Hague Convention and ICARA.
2. Specifically, to analyze the petitioner's case, including elements of a cause of action for return under the Hague Convention, and how the action is to be proved under the Convention and ICARA;
3. To explain the limited exceptions available under the Convention, and how they must be proved under ICARA;
4. To explain the judge's role in Hague return cases.

Recommended Length: one hour (20 minutes for each part of the course outline)

Subject Overview for Faculty

When a child is abducted to the United States, the Hague Child Abduction Convention's return remedy may be available if it can be shown that the removal or retention was wrongful within the meaning of the Convention, and that no exceptions to the return duty apply.

A lawyer representing a left-behind parent in an incoming case (i.e., where the child has been taken to, or kept in, this country) must understand the elements of a cause of action for return. This requires an understanding of Article 3 of the Convention, which establishes when a removal or retention of a child is considered wrongful and thus remediable under Article 12. It also requires review of the International Child Abduction Remedies Act (ICARA), which establishes uniform procedures for implementing the Convention in the U.S. ICARA covers matters such as jurisdiction, venue, notice, burdens of proof, admissibility of evidence, attorneys' fees and issuing interim measures when the child is in danger.

To be wrongful, the child's removal or retention must be in breach of custody rights that were actually exercised, or would have been but for the removal or retention. The rights of custody arise under the laws of the country in which the child was habitually resident immediately before the removal or retention. They may arise by operation of law, by court order, or by agreement of the parties, and they may be exercised jointly or alone. This means that a removal or retention may be wrongful even if there is no custody order in effect. For example, a parent who is exercising joint custody by operation of law during the marriage may use the Convention to seek return of a child who is taken unilaterally by the other joint custodian, just as a parent with a custody order may do.

The italicized terms must be understood not only to determine whether a petitioner

has a cause of action under the Convention for the child's return, but also for framing the pleadings. The presentation will focus on these concepts.

The court has a treaty obligation to return a child forthwith once it has been established that the removal or retention was wrongful within the meaning of the Convention unless one of the limited exceptions provided for in the Convention are proved. ICARA establishes the applicable burdens of proof.

Even if a defense is established, the court retains discretion to order a child returned. This should be emphasized as each defense is explained. The theory is that, in the normal course, the authorities in the child's country of habitual residence are able to address whatever concerns there are about custody, and can take whatever steps are necessary to protect the child pending the outcome of custody proceedings in that country. In essence, the Convention depends upon mutual respect among the courts in Contracting States, with the foundational principle that courts in the child's country of habitual residence will act in the child's best interests.

Under Article 12, return is mandatory if less than a year has elapsed between the time of the wrongful removal and retention and commencement of the return proceedings. Return is still required a year or more later unless respondent demonstrates that the child is now settled in its new environment. Even then the court may order return.

Article 13 provides three exceptions to the Convention's return obligation. Article 13(a) allows a defense if the person claiming a breach of custody rights was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention. Under Article 13(b), a child need not be returned if there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Article 13 also allows a judge to refuse return if a mature child objects to being returned. Article 20 is a defense that narrowly circumscribes any public policy argument against return. Article 20 provides that the child's return may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

The presenter will focus on the italicized terms to help respondent's lawyer frame defenses and to inform judges of their narrowly limited scope. Knowledge of defenses is also crucial to petitioner's attorney who should anticipate these defenses in crafting the return petition.

The Convention and ICARA affect how courts handle Hague cases. There is an emphasis on expeditious proceedings in Article 11, with a goal of completing a return case within six weeks. Article 16 prohibits a court from making substantive custody decisions pertaining to the abducted child during the pendency of a Hague case. Under Article 14, the court is permitted to take judicial notice of foreign law. Courts are required by Articles 23 and 30 and ICARA, 42 U.S.C. 11605, to admit documents filed in connection with the return petition without authentication or legalization. The court may request the petitioner to obtain a decision from his country of habitual residence concerning wrongfulness of the alleged removal or retention. This is authorized by Article 15. The court can enter interim orders to protect the child under ICARA, 42 U.S.C. 11604. Upon ordering return, ICARA, 42 U.S.C. 11607(b)(3), directs the court to order

the respondent to pay fees and expenses incurred by or on behalf of the petitioner unless respondent shows that this would be clearly inappropriate. Article 26 has a discretionary fee shifting provision that applies in both return and access cases.

CONTENT OUTLINE

O-8 I. Petitioner's Case for Return of A Child under the Hague Convention on the Civil Aspects of International Child Abduction

A. Introduction

If it is established by a preponderance of the evidence that the child has been wrongfully removed or retained within the meaning of the Hague Child Abduction Convention, the state or federal court hearing the case is under a treaty obligation to order the child returned forthwith if less than a year has elapsed between the date of the wrongful removal or retention and the commencement of the proceeding. The duty to return is absolute unless the respondent establishes one of the limited exceptions set forth in the Convention. Even then, the court retains discretion to order the child's return.

B. Initial screening of the case.

Scrutinize whether the alleged removal or retention is wrongful under the Convention. If so, the Convention probably is the left-behind parent's best chance for getting the child returned quickly.

O-9 C. A removal or retention is wrongful under Article 3 of the Convention, and thus would trigger the right of return under Article 12, if:

- a. it is in breach of custody rights attributed to a person, institution, or 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 the removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

- #### D. In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, courts may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of habitual residence of the child, without recourse to the specific procedures for the proof of law or for the recognition of foreign decisions which would otherwise be applicable. Article 14.

1. The Central Authority in the child's country of habitual residence may be helpful in providing information of a general character as to the law of their state. Article 7e.

E. A basic understanding of the bold italicized Convention terms is a prerequisite to drafting a thorough and effective petition for return.

O-10

1. What are custody rights?

- a. Custody rights are defined in Article 5a to include "rights relating to the care of the person of the child, and in particular, the right to determine the child's place of residence."
 - i. Whether the person asserting "custody rights" actually holds such rights is determined by the law of the child's country of habitual residence. Custody rights may arise by operation of law, court order, or agreement of the parties.
- b. Violation of a custody order is not a prerequisite for seeking a child's return under the Convention. Thus, a parent whose child is removed or retained by the other parent, without consent and prior to the entry of a custody order (e.g., during the marriage), may invoke the Convention for the child's return.
- c. There may be circumstances that permit a noncustodial parent with visitation ("access") rights to seek return of the child under the Convention, instead of invoking the lesser remedies available for breach of access rights under Article 21.
 - i. Courts in an number of countries have found that the right of a parent with court-decreed visitation rights to be consulted before the child is taken out of the country amounts to custody rights under the Convention. The rationale in such circumstances is that the noncustodial parent has a right to determine the child's place of residence. The same result has been reached when the custodial parent is required by court order to obtain advance consent of the court before removing the child from the country.

O-11

2. What is the child's country of "habitual residence" and why does it matter?

- a. The Convention only applies if the child was habitually resident in a Contracting State immediately before the alleged breach of custody or access rights. Assuming the Convention applies to the particular child, then the law of the child's country of habitual residence governs whether the person seeking return was exercising custody rights, the breach of which would be actionable.
 - i. The return petition should identify the child's country of habitual residence and assert that the child was habitually resident in that country immediately before the alleged wrongful removal or retention.
 - ii. Further, the petition must allege that the removal or retention was in breach of custody rights that petitioner has under the law of the child's habitual residence.
- b. The Convention does not define habitual residence.
 - i. However, it is a long-recognized concept in the Hague Conference, which treats it as a question of fact, thus distinguishing it from "domicile." Nor should habitual residence be confused with citizenship or nationality.
 - ii. Professor Elisa Perez-Vera, official reporter for the Hague Child Abduction Convention, explained that habitual residence is meant to refer to the center of the child's life.
 - iii. Habitual residence must be determined by the facts and circumstances of each particular case.
 - iv. It is a fluid concept.
 - v. There is no fixed period of time that a child must live in a country for it to be considered the child's habitual residence.
 - (1) In this respect, habitual residence differs from the "home state" concept in the UCCJA and PKPA, which is based on the child's presence in the forum for at least six months before commencement of the proceeding.
 - (2) Depending upon the facts of the case, habitual residence could be established in a

very short time.

- (3) Continuous periods of residence of at least a year have nearly uniformly been held to constitute habitual residence, regardless of a parent's intent.

- vi. Petitioner's attorney should review the substantial body of cases interpreting habitual residence. One of the most frequently quoted -- and followed -- interpretations of habitual residence in Convention case law is found in the English decision, *In re Bates*:

"There must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed, his purpose while settled may be for a limited period. Education, business or professional, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."

- vii. In framing the pleading, anticipate defenses the respondent may raise with regard to habitual residence. For instance, respondent may assert that the country from which the child was removed was not his/her country of habitual residence, or that petitioner did not have rights of custody under the law of the habitual residence.

3. What constitutes the "actual exercise" of custody rights?

- a. As part of the prima facie case for return, the petitioner must allege that he or she was actually exercising custody rights conferred by the law of the country in which the child was habitually resident immediately before the removal or retention, or would have done so but for the wrongful conduct. While the bare allegation may suffice, petitioner should provide factual support. If petitioner was exercising custody pursuant to a court order, the petition should cite the applicable provisions of the order. Copies of relevant documents may be appended to the return petition and are admissible (see below).

- b. The Sixth Circuit Court of Appeals interpreted actually exercised in Friedrich v. Friedrich, 78 F.3d 1060, 1064,1065 (6th Cir. 1996):

"...The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find "exercise" whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child..." The court continued, "We therefore hold that, if a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to "exercise" those rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child."

- c. Under Article 13(a), the alleged abductor has the burden of proving the non exercise of custody rights by the petitioner as an exception to the return obligation. This defense must be established by a preponderance of the evidence. 42 U.S.C. 11603(e)(2)(B).

F. Return Petition

- O-12 1. The petition for return should allege that:

&

O-13

The child is under the age of 16 (Article 4);
The child was habitually resident in a contracting state [identify] immediately before the breach of custody rights (Article 4);
The petitioner has custody rights within the meaning of Articles 3 and 5(a);
At the time of the removal or retention, the petitioner was actually exercising custody rights, either jointly or alone, or would have done so but for the removal or retention (Article 3(b));
The respondent wrongfully removed the child from the child's country of habitual residence on [specify date] and has wrongfully retained the child in [state], U.S.A., since [specify date] in violation of Article 3; [If less than one year has elapsed between the wrongful removal or retention and commencement of the proceeding, the petition should so allege, as this eliminates one possible defense based on the child becoming settled in its new environment.][If the child's precise whereabouts are unknown but he is believed to be in the jurisdiction of the court, the pleading should so reflect.]

The Convention is in effect between the child's country of habitual residence [identify country] and the United States; This court [identify state or federal court] has jurisdiction under 42 U.S.C. 11603(a), and the child is located within

the jurisdiction of the court;
Notice was given to respondent in accordance with law governing notice in interstate child custody proceedings.

2. In the prayer for relief, the petitioner should request the court to order:

The child's prompt return (or other appropriate placement of the child) pursuant to Article 12;
Respondent to pay petitioner's attorneys' fees and costs pursuant to 42 U.S.C. 11607.

G. Provisional remedies

1. Certain situations may necessitate interim remedial measures before the court can hear the Hague return case. Under 42 U.S.C. 11604, petitioner may request the court to order provisional remedies to protect the well-being of the child or to prevent the child from being abducted or concealed before final disposition of the case.
2. The request for provisional remedies may be made in the return petition, or in a separate pleading filed immediately prior to filing the petition for return.
3. Examples of the kind of relief petitioner may seek pending the outcome of the Hague case include orders:

prohibiting the respondent from removing the child from the jurisdiction;
directing respondent to post a bond;
requiring respondent to surrender passports to the court;
directing law enforcement officers to remove the child from the alleged abductor before the hearing on the Hague petition, provided this is allowed under state law.

H. Admissibility of documents

1. Counsel may append to the return petition any documents or other information relating to the request for return. This may include an application for return that was filed with a Central Authority, and any documents or other materials attached thereto.
2. Under 42 U.S.C. 11605, no authentication is needed and the information is admissible in court.
3. The applicable provisions of the Convention are Articles 23 and 30.

I. Form of action and prompt hearing

1. No specific form of civil action is required to commence a Hague return proceeding. Choose whatever caption will get the court's attention to handle the matter promptly.
 - a. Writs of habeas corpus may best accomplish this goal, but other forms of action may achieve similar results.
2. The Convention provides that courts can be asked by the Central Authority to explain delays in deciding return and access cases after six weeks have passed. Although nothing in the Convention mandates the court to decide the case within that short time frame, the Convention remedy is premised on prompt decision making.
 - a. Counsel may ask the court to give calender priority to the Hague case when it is filed. One way to do this is by filing a motion to expedite with the trial court. The motion should emphasize the need to restore the status quo antes as promptly as possible.
 - b. If the case is bogged down, counsel need not wait passively.
 - i. Ask the Central Authority to contact the court to request an explanation for the delay.
 - ii. If the trial court is unresponsive to requests for expedited hearing, consider petitioning the appellate court for a writ of mandamus directing the lower court to expedite consideration of the case. Weigh the risk of offending the trial judge against the need for swift action.
 - c. If an appeal is taken from an order for return, petitioner should resist any effort by respondent to obtain a stay (unless the client would prefer not disrupting the child until there is a final outcome). If the trial court stays its return order, petitioner should consider an immediate appeal to lift the stay. (Failing that, petitioner should insist upon the imposition of a bond by the respondent and an order prohibiting the respondent parent from removing the child from the jurisdiction.)

O-14 II. Defenses to a petition for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction

A. Introduction

1. Crafting a petition for return of a child under the Hague Child Abduction Convention requires an understanding not only of the elements of the cause of action for return, but also of the

defenses available to the respondent.

2. The rule of the Hague Convention is that courts hearing return cases are obligated to order a child returned forthwith if petitioner establishes, by a preponderance of the evidence, that the child has been wrongfully removed or retained within the meaning of the Convention and less than a year has elapsed between the date of the wrongful removal or retention and the commencement of the proceedings.
3. The exceptions to the rule, found in the Convention, are few. Even if a defense is established, the court may order a child returned.

B. Defenses to return

1. Article 12: Child settled in new environment after a year. The court is not obligated to order the return of a child when return proceedings are commenced a year or more after the alleged removal or retention and it is demonstrated that the child is settled in its new environment.
 - a. The court's determination of whether the child is settled in its new environment depends upon the particular facts of the case.
 - b. The respondent must establish this defense by a preponderance of the evidence. 42 U.S.C. 11603(e)(2)(B).
 - c. The best way for petitioner to avoid this defense is by filing for return as soon after the removal or retention as possible, and certainly within a year. A delay of a year or more could cost petitioner return of the child.
2. Article 13(a): Nonexercise of custody rights/acquiescence or consent.

The court may deny a return petition if the person having the care of the child was not actually exercising custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the removal or retention.

- a. What it means to actually exercise custody is discussed in the petitioner's case for return, I.E.3, above. Respondent may assert either that petitioner did not have custody rights under the law of the child's country of habitual residence, or was not exercising rights he or she had at the time of the alleged breach.
- b. Acquiescence or consent.

- i. Whether the applicant consented to or acquiesced in the removal or retention requires a detailed analysis of the facts.
 - ii. The Sixth Circuit Court of Appeals' decision in *Friedrich v. Friedrich*, 78 F. 3d 1060, 1070 (6th Cir. 1996) addressed the question of what constitutes acquiescence. The court said:

"Although we must decide the matter without guidance from previous appellate court decisions, we believe that acquiescence under the Convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding [footnote omitted], a convincing written renunciation of rights [footnote omitted], or a consistent attitude of acquiescence over a significant period of time."
 - iii. Questions about consent tend to arise when temporary removals turn into de facto permanent changes in custody. For instance, one parent may consent to the other parent taking the child on a temporary visit to that parent's home country. If the parent decides not to return, the left-behind parent will claim she or he did not consent to the permanent change of residence. Evidence or return airline tickets, school registrations, employment, etc., will help the court establish the true intentions of the parents.
 - iv. The respondent must establish an Article 13(a) defense by a preponderance of the evidence.
42 U.S.C.11603(e)(2)(B).
3. Article 13(b): grave risk of harm/intolerable situation. A court may refuse to order the return of a child where the respondent proves, by clear and convincing evidence (42 U.S.C. 11603(2)(A)), that there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
- a. It is a common defense strategy to try to persuade the court that return would not be in the child's best interests. The respondent may offer expert testimony and other evidence. Counsel for petitioner should urge the court not to allow the respondent to try the underlying custody case under the guise of proving a defense. A Convention case is not a custody case! A return decision is not a decision on the merits of custody; indeed, the court may not consider the underlying custody claims until it is determined that the child is not to be returned.

- b. There is ample case authority for the proposition that courts should interpret grave risk restrictively.
- c. A well-reasoned analysis of what constitutes grave risk is articulated in *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir.1996). The court held:

"We believe that a grave risk of harm for purposes of the convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute - e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."

- i. According to the *Friedrich* court, evidence that a child will suffer adjustment problems if returned to the country of habitual residence is not enough to establish a grave risk of psychological harm that would defeat the Convention's return remedy. The court's rationale is persuasive: the abducting parent should not be permitted to profit from the very situation he or she created by wrongfully removing or retaining the child in the first place.
- d. If the court denies an Article 13b defense but is concerned about the child's well-being pending a decision on custody in the country of habitual residence, the court may order "undertakings" along with its return order. An undertaking could allow the child's return in the care of the alleged abductor, with the petitioner to provide transportation and lodging for the respondent and child pending outcome of a custody hearing in the country of habitual residence. See Lesson Plan 6, Wrap-Up Session, for a more detailed discussion of undertakings. Undertakings should be used sparingly.

4. Article 13: mature child objects to return

The court may deny return if a child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.

- a. This defense must be proved by a preponderance of the evidence. 42 U.S.C. 11603(e)(2)(B).
- b. Like the others, the mature child' defense is discretionary. This is

particularly important because of the potential for brainwashing of the child by the alleged abductor or other family member. A child's objection to being returned should be given little weight if the court believes that the child's preference is the product of such undue influence.

5. Article 20

Article 20 allows a court to refuse to order return of a child under Article 12 if return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

- a. Article 20 is a defense that narrowly restricts any public policy argument against return.
- b. It is to be restrictively applied.
 - i. According to the State Department Legal Analysis of the Convention, it may be invoked "on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process."
 - ii. It is not to be used as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed.
 - iii. There is very little case law interpreting this provision.

6. Removal not from the child's country of habitual residence petitioner did not have custody rights under law of habitual residence.

The meaning and importance of habitual residence to the operation of the Convention is discussed in the petitioner's case for return, I.D.2., above. Suffice it to say, that if respondent proves by a preponderance of the evidence that the child was not removed from his/her country of habitual residence, or that petitioner did not have custody rights under the law of the country of habitual residence, then the court may dismiss the petition, effectively denying return.

O-15 III. The Role of the Court in Trying a Hague Case

- A. The Convention and ICARA affect how courts handle return and access cases.
- B. Trying a Hague case is very different from trying a custody case. There is a simple explanation: Hague cases are not substantive

custody cases. A decision to return (or not return) a child is not on the merits of the underlying custody claims. Article 19, ICARA, 42 U.S.C. 11601(b)(4). If a child is ordered returned under the Convention, the courts in the child's country of habitual residence may then hear the underlying custody case and make substantive custody and visitation orders.

1. The court cannot decide a substantive custody case pertaining to the abducted child once it receives notice of a wrongful removal or retention (unless a return proceeding is not commenced within a reasonable time), nor during the pendency of a Hague case. Article 16.

2. Petitioner may seek a stay of custody proceedings under Article 16.

C. Courts are commanded by Article 11 to act expeditiously in return proceedings, with a goal of deciding a return case within six weeks. If a decision is not made within six weeks of the commencement of the return proceedings, the Central Authority may request a statement of the reasons for the delay. (Petitioner's counsel may request the Central Authority to make such request.) See I.I.2., *supra*, for a discussion of how petitioner may seek priority calendaring.

1. Schedule a case management conference as soon as possible after the return petition is filed to narrow issues; establish what evidence will be allowed; ascertain whether protective measures are needed to prevent a reabduction and to determine whether interpreters will be required. Availability of interpreters can affect scheduling of the hearing.

D. The court is permitted to take judicial notice of foreign law (Article 14), and to admit documents filed in connection with the return case without the need for authentication or legalization. Articles 23 and 30, ICARA, 42 U.S.C. 11605.

1. However, the court may request the petitioner to obtain a decision from his country of habitual residence concerning wrongfulness of the alleged removal or retention. Article 15.

- a. The Legal Analysis of the Convention cautions against making routine requests under Article 15. In some countries, it may be impossible to obtain such a determination. Even if local law would allow it, requiring petitioner to obtain a determination of wrongfulness places undue emphasis on court orders, in contrast to the Convention's goal of restoring the factual situation that existed before the abduction. A further consideration is the length of time it will take to obtain the required determination, and thus delay disposition of the case.

E. Provisional Remedies.

1. ICARA authorizes courts to enter interim orders to protect the child before it can hear the Hague return case. Under 42 U.S.C. 11604, the court may order provisional remedies to protect the well-being of the child or to prevent the child from being abducted or concealed before final disposition of the case.
2. For instance, the court may issue orders:
 - prohibiting the respondent from removing the child from the jurisdiction;
 - directing respondent to post a bond;
 - requiring respondent to surrender passports to the court;
 - directing law enforcement officers to remove the child from the alleged abductor before the hearing on the Hague petition, provided this is allowed under state law. 42 U.S.C. 11604(b).

F. Mandatory fee-shifting

Upon ordering the return of a child under the Hague Convention, courts are required to order respondent to pay necessary expenses incurred by or on behalf of the petitioner, unless the respondent establishes that such order would be clearly inappropriate. ICARA, 42 U.S.C. 11607(b)(3).

- a. Expenses include court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child.

G. The Return Order

1. Once the court determines that the child's removal or retention was wrongful and that no exceptions apply, Article 12 provides that the court "shall order the return of the child forthwith."
2. An order for the return of a child envisions returning the child to the parent seeking his or her return. This usually will be to the child's country of habitual residence. However, if the petitioner has moved from the country of habitual residence, normally the child will be returned to the petitioner anyway, rather than to the country of habitual residence.
3. The court may order the child returned to the country of habitual residence, but allow the abducting parent to accompany the child home. Although the court cannot order the abductor-parent to return to the habitual residence with the child (the Convention mandates only the child's return), nothing in the Convention prohibits the court

from allowing it. This may be an appropriate solution where the court is persuaded that the child would be at risk of harm if returned to the applicant-parent. (See Chapter 8, Lesson Plan 6, question 5, for a discussion of undertakings.)

- a. There is some precedent for having the applicant-parent provide transportation and housing for the respondent-parent who wishes to return with the child.

ENDNOTES

LESSON PLAN 3: ACCESS CASES

Learning Objectives:

1. To explain the limited remedy available under the Convention when access (visitation) rights are violated.
2. To explain that noncustodial parents who have a right to be consulted before a child is removed from the country of habitual residence by the custodial parent have been held to have actionable rights of custody within the meaning of Articles 3 and 5a.
3. To suggest a UCCJA enforcement action as an alternative to the Convention in visitation cases.

Recommended Length: 15 minutes

Subject Overview for Faculty

The primary objective of the Convention is to secure the prompt return of children wrongfully removed to or retained in any Contracting State. The second stated purpose of the Convention is "to ensure that rights of access under the law of one Contracting State are effectively respected in other Contracting States." Article 1b.

The Convention defines "access rights" in Article 5(b) as including "the right to take a child for a limited period of time to a place other than the child's habitual residence." The closest equivalent term in U.S. family law is "visitation rights."

Access rights are protected by the Convention, but to a lesser extent than custody rights. The remedies for breach of access are set forth in Article 21. Significantly, they do not include the right of return. The return remedy is available under Article 12 only when there has been a breach of custody rights.

Interestingly, "the Courts of various States which have interpreted this provision have concluded, almost unanimously, that if a person having access (or visitation) rights with a child, also has the legal right to be consulted and to give or withhold consent before the child's residence may be moved to a different jurisdiction, he or she has "rights of custody" within the meaning of the Convention, even if these rights are not viewed as being "custody" rights under the law of the child's place of habitual residence.

This is true whether the requirement of consent has been granted in a specific court order, under general legislation or under court precedents. Thus, if a primary caretaker and custody holder removes a child from the country of habitual residence without obtaining the required consent, or a court order dispensing with such consent, the remedy is the same as for any other violation of rights of custody: return of the child."

Under Article 21, a person complaining of, or seeking to prevent, a breach of access rights may apply to the Central Authority of a Contracting State "to make arrangements for organizing or securing the effective exercise of rights of access."

The Central Authorities are then to cooperate pursuant to Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights is subject. The Central Authority shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. This includes initiating or facilitating the institution of proceedings, either directly or through intermediaries, to organize or protect access rights and to secure respect for the conditions to which these rights are subject.

A person who claims a breach of access rights need not apply to the Central Authority at all, but can apply directly to the courts of a Contracting State under the Convention or other law. Article 29.

Under ICARA, a person may initiate judicial proceedings under the Convention for arrangements for organizing or securing the effective exercise of rights of access to a child. 42 U.S.C. 11603(b). The petitioner has the burden of establishing by a preponderance of the evidence that s/he has such rights. 42 U.S.C. 11603(e)(1)(B).

An enforcement proceeding under the UCCJA may offer a more potent remedy than the Convention in access cases. The following explanation is excerpted from the Legal Analysis of the Convention, 51 Fed. Reg. 10514 (March 26, 1986):

"A noncustodial parent abroad whose visitation rights are being thwarted by the custodial parent resident in the U.S. could invoke the UCCJA to seek enforcement of an existing foreign court order conferring visitation rights. Pursuant to section 23 of the UCCJA, a state court in the United States could order the custodial parent to comply with the prescribed visitation period by sending the child to the parent outside the United States. This remedy is potentially broader and more meaningful than the Convention remedy, since the latter does not include the right of return when a custodial parent obstructs the noncustodial parent's visitation rights, i.e., by refusing to allow the other parent to exercise those rights. It is possible that a parent in the U.S. seeking to exercise access rights with regard to a child habitually resident abroad may similarly find greater relief under foreign law other than the Convention."

Article 26 allows a court to award attorneys' fees and expenses upon issuing an order concerning rights of access. Where appropriate, the court may direct the person who prevented the exercise of access rights to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, and the costs of legal representation of the applicant. (ICARA's mandatory award of fees and expenses unless clearly inappropriate applies only to return cases.)

CONTENT OUTLINE

O-16 I. Second purpose of Hague Convention is: "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States." Article 1 b.

A. "Access rights" are protected to a lesser extent than custody rights.

1. Remedies do not include right of return. Article 21.

a. Article 12 right of return only available when there has been a breach of custody rights within meaning of Article 3.

B. Access rights, defined

1. Article 5 (b): access rights include "the right to take a child for a limited period of time to a place other than the child's habitual residence."

2. Corresponding term in U.S. family law is "visitation rights."

3. Not all "access rights" are treated alike. When rights of access are combined with the right to be consulted and to give or withhold consent before a child's residence is moved to a different jurisdiction, courts have been almost unanimous in finding that the person has "rights of custody" within the meaning of the Convention for which return can be sought. This is so even if these rights are not considered custody rights under the law of the child's place of habitual residence. It is true whether the requirement of consent has been granted in a specific court order, under general legislation or under court precedents. Thus, if a primary caretaker and custody holder removes a child from the country of habitual residence without obtaining the required consent, or a court order dispensing with such consent, the remedy is

the same as for any other violation of rights of custody: return of the child."

II. Application to Central Authority

A. Under Article 21, a person complaining of, or seeking to prevent, a breach of access rights may apply to the Central Authority to make arrangements for organizing or securing the effective exercise of rights of access.

B. Article 21:

"The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authority, either directly or through intermediaries, may initiate or assist in the institution of proceedings, with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject."

- a. The Explanatory Report by Elisa Perez-Vera suggests how central authorities might cooperate to secure the exercise of access rights:

"...it would be advisable that the child's name not appear on the passport of the holder of the right of access, whilst in 'transfrontier' access cases it would be sensible for the holder of the access rights to give an undertaking to the Central Authority of the child's habitual residence to return the child on a particular date and to indicate also the places where he intends to stay with the child. A copy of such an undertaking would then be sent to the Central Authority of the habitual residence of the holder of the access rights, as well as to the Central Authority of the State in which he has stated his intention of staying with the child.

This would enable the authorities to know the whereabouts of the child at any time and to set in motion proceedings for bringing about its return, as soon as the stated time-limit has expired..."

III. Judicial remedies under the Convention

- A. A person who claims a breach of access rights need not apply to the Central Authority at all, but can apply directly to the courts of a Contracting State under the Convention or other law. Article 29.
 1. UCCJA enforcement action may be a better remedy than Article 21 of the Convention when parent's visitation rights are pursuant to foreign court order. A state court enforcing a foreign custody decree may order the child sent abroad for visits.
- B. Under ICARA, a person may initiate judicial proceedings under the Convention "for arrangements for organizing or securing the effective exercise of rights of access to a child." 42 U.S.C.

11603(b).

1. The petitioner has the burden of establishing by a preponderance of the evidence that she/he has such rights. 42 U.S.C. 11603(e)(1)(B).

C. Fees and expenses may be awarded under the Convention.

1. Article 26 allows a court to award attorneys' fees and expenses upon issuing an order concerning rights of access. Where appropriate, the court may direct the person who prevented the exercise of access rights to pay necessary expenses incurred by on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, and the costs of legal representation of the applicant.
2. ICARA's mandatory award of fees and expenses, unless clearly inappropriate, applies only to return cases. 42 U.S.C. 11607(b)(3).

ENDNOTES

LESSON PLAN 4: SMALL GROUP ROLE PLAY: TRYING A HAGUE RETURN CASE - FROM THEORY TO PRACTICE

Learning Objectives:

To reinforce substantive law sessions through practical application. Specifically, to apply Hague Convention and ICARA to hypothetical Hague child abduction case.

Recommended Length: one hour (3 break out groups meet for 10 minutes, then reconvene as a large group for presentations, not to exceed 10 minutes each.)

Format: The audience is divided into three groups. Each group will have 15 minutes to analyze and outline the issues in a hypothetical case from its assigned perspective. The groups will reconvene as a whole for individual presentations of 10 minutes each. The petitioner's group will present the case for return. The respondent's group will present the defenses to return. The judge's group will make appropriate rulings and orders, and will comment on evidentiary and other case management issues. General discussion will follow, led by one faculty member acting as moderator.

The hypothetical case summary will be included in the handouts.

Faculty members should serve as facilitators for each group. Alternatively, each group will select a leader for the deliberations and presentation.

A flip chart or overhead projector and transparencies will be provided for note taking.

Subject Overview for Faculty

The case hypothetical presented below requires participants to apply the information presented in the preceding lectures. It calls upon the audience to analyze a Convention case from the points of view of the left-behind parent, alleged abductor, and judge. This interactive activity should put a practical spin on the legal theory discussed previously.

HYPOTHETICAL CASE SUMMARY

O-17 Father (Frank), a citizen of Canada, lives in New York. He is wealthy but has no known occupation. Mother (Molly), a U.S. citizen, lives in Montreal, Canada. She is a waitress. Her erratic work schedule routinely creates day care problems. Child (Charlie), who recently turned 7, is a dual citizen of the U.S. and Canada. He is often left alone after school due to his mother's job.

Frank and Molly married in California where Charlie was born. When Charlie was 6, the marriage faltered and Frank and Molly separated. Frank moved to New York and Molly moved with Charlie to Montreal where they have lived for about a year. Although Frank has known from the start where Molly and Charlie live, his contact with Charlie has been very limited. He has only visited once, and rarely telephones.

Molly has de facto custody. She never brought action to formalize her physical custody of Charlie. Funds were scarce and she didn't feel the need: Frank never expressed any objection about the custody arrangement. However, Frank started an action in New York for custody, but Molly was not notified of the proceeding. The case is pending. No order has been issued.

Summer vacation was a day care nightmare for Molly because of her increased hours at the restaurant. She was desperate for money and needed the work. She arranged for Charlie to spend July and August with Abby, his paternal aunt, in Quebec, until school resumed. The arrangement worked well until Abby mentioned to Frank that Charlie was spending the summer vacation with her.

Without consulting Molly, Frank flew to Quebec and took Charlie back with him to New York. Molly found out about it two days later when she made her next scheduled call to Charlie.

Molly called Frank immediately for an explanation. She demanded Charlie's return on the next flight. However, Frank persuaded her to let Charlie stay with him in New York for the rest of the summer. There was some merit to his argument that it made more sense for Charlie to be with his father than with his aunt. Given Frank's minimal contact with Charlie over the last year, Molly only reluctantly agreed. Though it was never stated, Molly assumed that Frank would return Charlie for the start of school in September. He was pre-registered for second grade in Montreal's public schools.

Molly called Charlie twice a week during his visit with Frank. He told her about the great things they were doing, the kids he was meeting, and about the neat new school his father told him he would be going to in the fall. Molly never discussed the matter of the new school with Frank, and always reassured Charlie that he would be home soon.

August ended but Charlie did not come home. A phone call to Frank confirmed her worst fear -- Frank wasn't sending Charlie back!

In fact, Frank had enrolled Charlie in the New School in New York. On the one hand, she could not bear the thought of Charlie not coming right home. On the other hand, she didn't think any harm would come from allowing Charlie to stay with his father for a few months. After all, Charlie sounded well adjusted on the phone. Even though he said he missed her a lot, he was happy in New York and liked the New School so far.

And so Molly did not protest. She needed a few months anyway, as she was moving to a new apartment and starting a new job. She also needed time to end a rocky relationship with an abusive boyfriend.

By Halloween, Molly had tied up all of her personal loose ends.

She called Frank to make arrangements for Charlie's return to her by Thanksgiving, so that he could resume school in Canada without further delay. Her requests fell on deaf ears. She called him daily and wrote him several letters urging him to make arrangements for Charlie's return to Canada. No deal, Frank told her repeatedly. Charlie was not going anywhere! He thought matters were settled, until he was served with Molly's petition for return under the Hague Convention.

-- -- --

How do things turn out for Molly, Charlie, and Frank?

Discussion Points

Note to facilitator: A partial list of issues for each group follows. Other discussion points are suggested. Vary the facts to elucidate other aspects of the operation of the Convention.

I. Petitioner's case: Molly's request for Charlie's return

A. Issue: Was there a wrongful removal or retention within the meaning of Article 3?

1. Was Canada Charlie's country of habitual residence?

a. Yes, he was living there for about a year at the time he was taken to New York. Neither parent remained in California. Nationality is immaterial; child must be removed from country of habitual residence and taken to a Contracting State. Both Canada and U.S. are Contracting States.

2. Was there a breach of custody rights?

a. Did Molly have custody rights?

i. Yes, by operation of law. No custody order needed. She was a joint custodian exercising her rights of joint custody with Frank's tacit consent. The fact that he filed for custody did not affect her exercise of custody. When Frank took Charlie unilaterally and without her permission, he violated her custody rights. When he refused to return Charlie, he did the same.

b. Was Molly actually exercising her rights of custody?

i. Yes. Custody rights include the right to determine where the child lives. Thus, temporarily placing child with Aunt Abby constituted exercise of custody rights. Also, allowing Charlie to stay with Frank for a few months was an exercise of her rights of custody (and not, as Frank will argue, her acquiescence to his retention of the boy).

II. Father's response to mother's petition for return

A. Issue: What exceptions to return will father argue?

1. Neither the removal nor retention were wrongful

a. Removal:

Frank's removal of Charlie may have been wrongful (if you accept mother's argument that a joint custodian in a pre-decree cases doesn't have an equal right to take his child), but mother soon consented.

b. Retention:

Frank's retention of Charlie was with mother's acquiescence.

(Molly will argue that she was exercising her rights of custody when she allowed Charlie to stay in New York for a few months, not acquiescing in a change of custody. The fact that she did not protest Frank's keeping Charlie in September should not be construed as acquiescence; she always intended that Charlie would return home in a few months after she straightened out her life. He was registered in school in Montreal for his second year there. Moreover, she demanded Charlie's return and Frank did not comply; the retention was wrongful and thus actionable.)

- c. Frank will argue that Molly was not exercising her custody rights, given that child was living with Aunt. (Molly will argue that one of the rights of custody is the right to determine a child's place of residence.)
- d. Frank will also argue that he was joint custodian entitled to take child. (This argument is without merit. Under the Convention, it is wrongful for a joint custodian to unilaterally remove a child from his country of habitual residence in breach of the other joint custodian's rights.)

2. Article 13b: Return would subject the child to grave risk of psychological or physical harm or otherwise place the child in an intolerable situation.

- a. Frank may argue that Charlie should not be returned to a situation that could include an abusive ex-boyfriend stalking Molly and potentially endangering both of them. (The boyfriend is out of the picture; there is no evidence he harmed Charlie; and the courts in Canada can protect Charlie should that become a real need.)
- b. Mother's relative lack of wealth in comparison to father does not create an intolerable situation.

3. Article 13: mature child objects

Query whether a 7-year old is mature enough to express an opinion? Even if he was unusually mature, what weight should court give to his wishes? What are the chances of his being unduly influenced by his father's wealthy life style?

4. Child now settled in new environment

This Article 12 defense should be rejected. It only applies if the return proceeding is commenced a year or more after the alleged wrongful removal or retention. Molly started this case within a year.

III. Other questions for discussion

- A. What effect does the pending N.Y. custody case have on the Hague proceeding? None. Hague case on N.Y. proceeding? N.Y. court must not decide the merits of custody case until a decision on the return petition is made.
- B. What should the court do during the pendency of the case?
1. Assign the case calendar priority. Try the case quickly -- within 6 weeks or less.
 2. Consider the need for provisional remedies if requested by Molly.
 3. Do not allow respondent's presentation of defenses to turn the case into a full-blown custody trial.
 4. If unclear on the issues, ask for briefs on operation of Convention. (U.S. Central Authority may send a letter to the court explaining the Convention.)
 5. If the decision is to order the child's return, remember to award attorneys' fees and expenses in accordance with ICARA!
- C. What role might the central authorities have played in this case?
1. Mother's application for return filed with Canadian CA
 2. Transmission of application to US CA
 3. US CA may have sought voluntary return
 4. US CA may have helped mother find attorney in New York
 5. US CA may have sent letter to judge explaining Convention
 6. US CA may have requested explanation of delay from New York court
 7. US CA may have helped arrange transportation back to Canada. (Assistance may have been sought from the Canadian Central Authority, or possibly from Canadian embassy or consulate in U.S.)
 8. US CA and Canadian CA -- undertakings re: future visits
- D. What safeguards should be considered to prevent an abduction in the future?

Note to facilitator: this leads into the next session.

ENDNOTES

LESSON PLAN 5 : IDENTIFYING AND PROTECTING CHILDREN AT RISK FOR ABDUCTION

Learning Objectives:

1. To inform judges and lawyers about risk profiles for abductors.
2. To enable lawyers and judges to recognize general warning signals of abduction.

2. To identify prevention strategies.

Recommended Length: 30 minutes

Subject Overview for Presenters

Given the high incidence of child abductions and the harm suffered by victim children, a parent's concerns about potential abduction to a Hague or non-Hague country should not be ignored.

When a parent requests judicial safeguards against a threatened or feared abduction, the court should consider three variables:

1. the risk for abduction;
2. obstacles to the location and recovery of the child if the abduction occurs;
and
3. the potential harm to the child if abducted.

Recent ground-breaking research identified six profiles of abduction risk. These risk profiles, along with a sizable list of "red flag" warning signs for abduction, should help judges and lawyers assess the likelihood of an abduction.

When there is a high risk of abduction, a low likelihood of recovery, and the potential for negative impact on the child, stringent and restrictive preventive measures are needed. In cases where there is a low risk of abduction with a high likelihood of recovery, less restrictive measures may be warranted.

To facilitate enforcement in the event of an abduction, court orders routinely should state the basis for the court's jurisdiction. A specific statement of visitation rights is recommended instead of 'reasonable visitation' language.

Other provisions may reduce the risk of child abduction and should be included in court orders when circumstances warrant. These include supervised visitation, restrictions on removing the child from the state or country, bonds, passport restrictions, and mirror-image orders.

CONTENT OUTLINE

I. Need for Prevention

A. Harmful effects of abduction on children

1. Parental kidnapping has been characterized as a form of child abuse

B. High incidence of abduction

1. NISMART study estimated 354,000 abductions in U.S. in 1988

2. Of abductions occurring in the United States, probably between 7-10% are to other countries.
3. According to statistics compiled by the Department of State as of January 1993, the U.S. Central Authority reported 564 incoming Hague cases, and 664 outgoing cases.

C. Preventive measures may facilitate prompt enforcement in the event of an abduction.

II. Knowing When Preventive Measures Are Needed

A. When a parent requests judicial safeguards against a threatened or feared abduction, three variables should be weighed in deciding whether preventive measures are needed, and if so, what kinds are appropriate to the circumstances. The three variables are:

1. the risk for abduction;
2. likely obstacles to the location and recovery of the child if the abduction occurs; and
3. the potential harm to the child if abducted.

B. When there is a high risk of abduction, a low likelihood of recovery, and potential adverse impact on the child, stringent and restrictive preventive measures should be ordered.

C. In cases where there is a low risk of abduction with a high likelihood of recovery, less restrictive measures may be warranted.

O-17 III. Assessing Risk for Abduction

A. Common indicators of abduction risk.

There may be an increased likelihood of an abduction if a parent has:

previously abducted or threatened to abduct the child, including perpetrators of domestic violence who threaten abduction and frequently carry out those threats;

no strong ties to the child's home state or country;

a strong support network elsewhere of family or friends;

no job, is able to earn a living anywhere, or is financially independent-- in other words, not tied to the geographical area for financial reasons;

engaged in planning activities, such as quitting a job; selling a

home; terminating a lease; closing a bank account or liquidating other assets, hiding or destroying documents; applying for passports; undergoing plastic surgery;

a history of marital instability, lack of cooperation with the other parent, or domestic violence; or

a criminal arrest record.

B. Six profiles of abduction risk were identified recently in ground-breaking research. They are identified in C. below.

O-18 1. Characteristics common to each of the six profiles of abducting parents:

- a. They are likely to deny or dismiss the value of the other parent to the child. They believe they know what is best for the child and cannot see how, or why, they should share parenting with the other parent.
- b. They are likely to have very young children, who are easier to transport and conceal, unlikely to protest verbally, and unable to tell others of their plight.
- c. Excepting the paranoid profile, other abducting parents are likely to have the financial or moral support of a network of family, friends, and/or cultural, community or underground groups.
- d. Many do not consider their actions illegal or morally wrong.
- e. About equal numbers of mothers and fathers abduct, although at different times: father more often before a court order, and mother, more often after an order has been made.

O-19 C. Six profiles of risk abduction

Many parents have characteristics of more than one profile.

1. Prior threat of, or actual, abduction.
When a parent has made credible threats to abduct a child or has a history of hiding the child, withholding visitation, or snatching the child back and forth, there is a heightened risk of abduction.
2. The suspicious or distrustful parent who believes abuse has occurred. The risk of abduction is elevated when a parent has a fixed belief that the other parent has abused, neglected, or molested the child, allegations that must be taken seriously and be promptly and thoroughly

investigated. When a parent feels that authorities have dismissed the allegations as unsubstantiated and have done nothing to protect the child, the risk of abduction increases.

3.& 4. The paranoid or sociopathic parent.

This small group of parents present the greatest potential risk of harm to the child. Paranoid/delusional parents have irrational or psychotic delusions that the other parent will harm him/her and/or the child. These parents (who comprised only 4% of the sample population) are often the most dangerous and frightening abductors, especially if they have a history of perpetrating domestic violence, prior hospitalizations for mental illness, or substance abuse. In general, a marital separation and ensuing custody dispute triggers an acute phase of danger, which can increase the threat not only of abduction but also of murder/suicide.

Sociopathic parents have a history of flagrant violations of the law and contempt for authority. Such parent may use the child as an instrument of revenge or punishment. This parent believes that domestic violence and child abduction can be perpetrated with impunity.

5. Foreign parent with strong ties to the homeland.

Parents who are or were citizens of other countries may have strong ties to extended family and the culture or religion of their homeland. Parents in this group who are at risk for abducting tend to be those who idealize their own family, country, and culture, and devalue American culture. They generally have emotional and financial support available to them in their home country.

6. The disenfranchised parent. This parent feels disenfranchised from the judicial system. Many are poorly educated and indigent. They may not have access to the legal system due to lack of money, knowledge, or comfort in its remedies or responsiveness. Within this group, unmarried parents often view the child as properly with the mother, a view shared by members of their extended family who support them. Victims of domestic violence may be at risk for abducting, especially when they feel it is the only way to protect themselves and their children. While the parent fleeing violence may not view their conduct as "abduction," according to the law in most states, it is.

IV. Obstacles to locating and recovering the child

- A. If the court finds a likelihood of abduction, it should next consider whether, and the extent to which, the other parent would encounter obstacles in locating and recovering the abducted child.
- B. Obstacles can be legal, procedural, cultural, or practical.

C. Hague vs. Non-Hague country

1. Abduction to Hague country: a legal remedy is available to facilitate the child's return. There may be limitations on the effectiveness of the remedy, however.
 - a. Return rates vary from 5 - 95% among Hague countries indicating a lack of uniformity in its implementation.
 - b. The Hague remedy does no good if the child's whereabouts are unknown, since the child cannot be sent back if he cannot be found. Moreover, there may be problems bringing the Hague case when the child cannot be located.
2. Abduction to non-Hague country: obstacles may be insurmountable
 - a. Country may not recognize U.S. court orders
 - b. Country may favor its own nationals
 - c. Country may decide custody on religious, cultural, or gender grounds, without regard to child's best interests.

V. Potential harm to the child

- A. The court must consider the potential harm the child would suffer if an abduction occurs.
- B. Possible long-term psychological harm of abduction experience as well as separation from other parent.
- C. Possible physical abuse during the taking or over the course of abduction
- D. Possible neglect during concealment, e.g., lack of schooling, medical care, etc.
- E. Serious harm likely with parents who have serious mental and personality disorders, where the parent has a history of violence, abuse, where abducting parent has had little or no prior relationship with the child, or where child is placed by abducting parent with family or others with whom the child had little or no prior relationship.

O-20

[Interventions]

O-21 VI. Safeguards

- A. Generally

Well-crafted court orders can help prevent child abductions or

facilitate enforcement. Lawyers should request the court to order preventive measures suited to the facts of the case. The court order might include any combination of the following provisions:

1. Statement of jurisdiction should be included in every custody/visitation order to facilitate enforcement should this become necessary.
2. Specific statement of visitation rights: Avoid awards of 'reasonable visitation'
3. Supervised visitation
4. Bonds and writs ne exeat
5. Mirror-image order from foreign court
6. Restrictions on removing child from the state and country
7. Prohibition on obtaining original and replacement U.S. passports for children
8. Required surrender of passports before visits
9. Statement in boldface that **VIOLATION OF THE ORDER MAY SUBJECT THE PARTY IN VIOLATION TO CIVIL AND CRIMINAL SANCTIONS.**
10. Avoid joint custody where international abduction is likely.
11. Include a photograph of child in the casefile. Update periodically.

B. Safeguards specific to risk profiles

Profile 1: The prior threat of, or actual abduction.

Safeguards: Order supervised visits, require the posting of a bond; prohibit removal of the child from the state and country; flag passports, school, medical, birth records

Profile 2: The suspicious or distrustful parent.

Safeguards: Thoroughly investigate the abuse allegations; order temporary supervised visitation pending the investigation; determine whether the child needs therapy; communicate findings to parents and other relevant professionals and support persons.

Profiles 3& 4: The paranoid and sociopathic parent (greatest risk

of potential harm).

Safeguards: Assess lethality. If this is the noncustodial parent, order supervised visitation at a facility with strict security. If there are repeated violations of the visitation order, visitation may have to be suspended. Therapy may be needed by both the child and parent. Also, consider awarding temporary custody to the other parent or to a third party.

Profile 5: Foreign parent.

Safeguards: More pressing need when abduction would be to a non-Hague Convention country. Consider: culturally-sensitive mediation or counseling; bonds; requiring the likely abductor to surrender the child's passport to the other parent or the court prior to visits; requiring the foreign parent to obtain a mirror-image order; prohibiting the foreign parent from applying for new or replacement passports for child; directing the parent to provide a copy of court order to foreign embassy, with an additional requirement that the embassy provide the court with an acknowledgment of receipt of its court order.

Profile 6: Disenfranchised parent.

Safeguards: provide access to legal services, pro se clinics, and translation services; educate parent and social network regarding abduction laws; when domestic violence is an issue, appropriate protection orders are needed. Visitation orders should be made with safety in mind. More flexibility regarding court approved relocation with the child is advisable. Address information should be kept confidential by the court to prevent further risk of harm.

ENDNOTES

LESSON PLAN 6: CONVENTION WRAP-UP & PROBLEM SOLVING

Learning Objectives:

1. To summarily cover miscellaneous issues concerning the Hague Convention and international abduction cases.
2. To answer remaining audience questions.

Recommended Length: 30 minutes.

Subject Overview for Faculty

In this session, faculty members will have a chance to raise issues that have not been

addressed previously. The purpose is to flag issue for lawyers and judges rather than to provide in-depth coverage.

After these few matters have been discussed, questions submitted throughout the program by participants will be asked and answered. Faculty will volunteer to answer the questions. Audience participation and reaction will be invited.

CONTENT OUTLINE

- I. What is the role of the lawyer in outgoing Hague cases?
 - A. File application for return with U.S. Central Authority.
 - B. Help client find a lawyer in requested country for Hague return proceeding in that country.
 - C. Obtain an Article 15 declaration of wrongfulness.
 - D. Provide foreign lawyer with information about U.S. law, if requested to do so.

- II. Should a return petition be filed in state or federal court?
 - A. Which court can hear the matter sooner?
 - B. Which court will entertain a summary procedure, such as a writ of habeas corpus?
 - C. Does either court have prior Hague Convention experience?
 - D. If neither court has handled a Hague case before, is one more likely to treat the case as a substantive custody trial?
 - E. Does the respondent have strong local influence that causes the foreign-petitioner to believe the local court will be biased against him or her?
 - F. Does the attorney have experience litigating in federal court?
 - G. Is the lawyer admitted to practice before the court?

- III. What the Central Authority do to help when a return case is filed in the U.S.?
 - A. CA will help find pro bono counsel, if appropriate.
 - B. CA will provide a complete packet of information on the operation of the Convention in the U.S.
 - C. At applicant or attorney's request, CA will send a letter to the court in which the Hague petition has been filed explaining the operation of the Convention.
 - D. Upon request, the CA will seek a report on the status of the court action if the court has not ruled by the end of 6 weeks.
 - E. Upon request, the CA will seek from foreign CA information relating to the social background of the child, or a statement as to the wrongfulness of the taking under the laws of that country.
 - F. CA will help locate abducted child, or confirm location.
 - G. CA will help lawyers find non-government translators.
 - H. CA may help arrange transportation home for the abducted child (but not at U.S. government expense). The CA may refer the applicant to

his or her embassy, which may have funds or offer repatriation loans to facilitate return. The CA also may contact the foreign Central Authority to inquire about possible funding.

- a. When there is little risk of another abduction, at parent's request, CA will endeavor to secure voluntary return.

IV. Are there criminal penalties for abducting a child from the U.S.?

- A. The International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. 1204 (1993), makes it a federal felony to remove a child from the United States or retain a child (who has been in this country) outside the U.S. with intent to obstruct the lawful exercise of parental rights. Parental rights include custody and visitation rights which arise by court order, operation of law, or agreement.
- B. Three defenses are provided:
 1. defendant had a valid custody order;
 2. flight from domestic violence; and
 3. failure to return was unavoidable, with notice to left-behind parent and prompt return thereafter.
- C. IPKCA expresses the sense of Congress that proceedings under the Hague Convention, where applicable, should be the option of first choice before resort to criminal prosecution under this statute.

V. What are undertakings?

- A. A court may order return of a child subject to certain conditions being fulfilled. These conditions have been referred to as "undertakings." Often taking the form of stipulations or consent orders, they have long been a part of English family law and they encourage families to settle their problems.
- B. Undertakings are ordered in connection with return orders under the Convention primarily to protect the child until the courts of the country of habitual residence can act either to protect the child or to decide substantive custody issues. For example, if an Article 13b defense has been raised, the court may order the child returned subject to certain conditions to protect the child from possible harm. The court could order the child returned in the care of the alleged abductor. Such an order may further require the petitioner to provide transportation and lodging for the child and respondent in the country of habitual residence until custody and access issues are resolved on the merits. Or, the court may order the child returned to the care of the social service agency in the child's country of habitual residence until a court determines custody.
- C. While undertakings may facilitate the child's return, there is a serious

question as to their enforceability in the country of habitual residence. Although there is no legal basis to require a court in the country of habitual residence to comply with an order for undertakings made by the court ordering return, they may be enforced as a matter of comity. At a minimum, they may have some persuasive effect on the courts in the child's habitual residence.

One way to ensure that the conditions are carried out is to require the parent bound by the undertaking to obtain a mirror-image order in the country of habitual residence. This should be done quickly, so as not to delay return of the child.

- D. Courts in the England and Ireland have made liberal use of undertakings. In contrast, Australian courts question their utility because of enforcement problems: they are of doubtful enforceability outside the jurisdiction of the court that issues them. Courts in the U.S. should take a conservative approach to ordering undertakings.

VI. What are safe harbor orders?

- A. Safe harbor orders are made by courts in the child's country of habitual residence. These orders bind only the courts that make them, and are essentially advisory in nature to the court in the country of refuge.
- B. They may be issued in conjunction with an Article 15 determination, identifying the child's country of habitual residence, declaring that petitioner had custody rights and that the removal or retention was wrongful.
- C. Safe harbor orders typically set up conditions in the child's country of habitual residence to protect the child upon his or her return there pending legal proceedings to resolve custody and visitation issues. Without determining the validity of allegations into the fitness of the parent in the country of habitual residence to have custody of the child, a safe harbor order might stay an existing custody order, and temporarily grant custody to a designated party pending adjudication of the underlying issues.
- D. In contrast to an undertaking (which may have similar goals), a safe harbor order would be enforceable in the country of the child's habitual residence once he or she is returned there because it is made by a court in that country.
- E. While the existence of a safe harbor order in the child's country of habitual residence may make it easier for a court to reject an Article 13b defense in a Hague return case, the existence of such an order is not a condition prerequisite to ordering return under the Convention.

VII. Questions and cases hypotheticals from registrants.

OPTIONAL LESSON PLAN 7: CASE STUDY OF THE FRIEDRICH v. FRIEDRICH LITIGATION

Learning Objective:

1. To study an actual Hague case to better grasp how lawyers build cases, and how courts interpret the Convention and dispose of issues.

Recommended Length: 45 minutes to an hour

Format:

Divide the audience into four smaller groups. Break out into separate rooms, or, with a small audience, disperse throughout the main meeting room. Each group will be given one of the four decisions in the epic Friedrich case. They will each be asked to brief their part of the case. The case summaries will be presented in sequence, forming a complete picture of how the litigation evolved. The judicial interpretations of key Convention concepts will be reviewed. Last but not least, there will be critical discussion of the litigation, with recommendations for handling similar cases in the future.

The four parts of the Friedrich case appear in the appendix. (The disk version includes cites only to the two appellate opinions.)

Subject Overview for Faculty

The Sixth Circuit Court of Appeals wrote two opinions in this four-year legal odyssey. The opinions contain some of the most frequently-cited and followed interpretations of key Convention terms. Yet, the very fact that it took four years to reach a final decision in the case should raise some red flags: isn't the Convention remedy intended to be expeditious? There is no substitute for reading the opinions yourself. Only then will you have the flavor of the Friedrich family's long journey in our courts.

CONTENT OUTLINE

I. Friedrich v. Friedrich [Part I]

Original U. S. District Court Order (Jan. 1992) U.S. District Court, Southern District of Ohio, Western Division, Herman J. Weber, Judge

- A. Father seeks return under the Hague Convention of his son, who was removed from Germany by his mother following an event where father threw mother, son and their belongings out of the apartment. Mother was in the Army stationed in Germany. She returned to the U.S. with the couple's son Thomas, lacking funds to live off base, and

prohibited from living on base with the child.

B. Decision: father's petition for return denied.

C. Rationale

1. By unilaterally expelling Thomas from his residence...petitioner terminated his actual exercise of his parental custody rights over Thomas. Consequently, when mother took child to the U.S. without petitioner's knowledge or consent, she did not wrongfully remove Thomas from Germany within the meaning of the Convention.
2. By expelling Thomas from the family home, father altered son's habitual residence from his in Germany to that of his mother in the U.S. Thus, relief under the Convention is unavailable.

II. Friedrich v. Friedrich [Part 2] "FRIEDRICH I"
983 F.2d 1396 (6th Cir. 1993), Danny Boggs, Circuit Judge

A. Father appeals from the denial of his petition for the return of his son, Thomas, to Germany.

B. Issue: This is a case of first impression, requiring a determination of when the removal of a child from one country to another by one parent, without the consent of the other, is "wrongful" as defined in the Hague Convention.

C. Analysis

1. Court interprets "habitual residence." There can be only one, the customary residence prior to the removal. The court must look back in time, not forward. 983 F.2d 1396,1400.
2. Thomas's habitual 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; here, the removal precipitated the change in geography. If we were to determine that by removing Thomas from his habitual residence without father's knowledge or consent mother "altered" his habitual residence, we would render the Convention meaningless. It would be an open invitation for all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence". 983 F.2d 1396, 1401.
3. Court finds that Germany is child's habitual residence, not U.S.

D. Ruling: District Court's ruling reversed. Case remanded for

determination of whether, under German law, father had custody rights at the time of the removal that he was exercising or would have exercised but for the removal, and for consideration of affirmative defenses. (Court below had ruled that father terminated his actual exercise of parental custody rights when he unilaterally expelled mother and son from his residence.)

III. Friedrich v. Friedrich [Part 3] (April 1994)

U.S. District Court, Southern District of Ohio, Western Division Herman J. Weber, Judge

A. On remand to the district court for a determination of whether, under German law, father had custody rights over his son at the time of the boy's removal from Germany, and whether he was exercising those rights or would have exercised those rights but for the removal, and for consideration of any affirmative defenses mother may raise.

B. Held:

1. Father demonstrated by a preponderance of the evidence that he had custody rights under German law and that he was actually exercising those rights at the time of the removal. He neither terminated or abandoned his custody rights.
2. Mother failed to establish Article 13b defense by clear and convincing evidence.

C. Relief

1. Court granted father's request for return and ordered child's return to Germany. The parties agreed that mother would retain physical control of Thomas and will return him to Germany forthwith at her own expenses.
2. Court later stayed the order, upon the posting of a bond by mother pending resolution of appeal. Although hotly contested below, the stay was not challenged on appeal.

IV. Friedrich v. Friedrich [Part 4] "FRIEDRICH II"

78 F.3d 1060 (6th Cir. 1996), Danny Boggs, Circuit Judge

A. Issues on appeal:

1. What does it mean to "exercise" custody rights?
2. When can a court refuse to return a child who has been wrongfully removed from a country because return of the abducted child would result in a "grave" risk of harm?

B. Analysis

1. Court broadly defines "exercise": "...liberally find "exercise" whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child." 78 F.3d 1060, 1064. "...if a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to "exercise" those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child." 78 F.3d 1060, 1066.
2. Grave risk of harm exception: to be given restrictive reading. "...a grave risk of harm can exist in only two situation. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute - e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection." 78 F.3d 1060, 1068-69. "...A removing parent must not be allowed to abduct a child and then -- when brought to court-- complain that the child has grown used to the surroundings to which they were abducted." 78 F.3d 1060, 1068.
3. "Acquiescence" interpreted to require either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time. 78 F.3d 1060, 1069.

- C. Ruling: Affirming the district court's order that Thomas be returned, and vacating the district court's stay of that order pending appeal. "Because Thomas's return to Germany is already long-overdue, we order...that our mandate issue forthwith."

Chapter 9. PARTICIPANT FEEDBACK QUESTIONNAIRE

An excellent way to refine this curriculum for future programs and evaluate specific presenters is by seeking feedback from the participants. The questionnaire is short and easy to fill out. Distribute it before the second break. Ask participants to place the completed questionnaires in a designated box near the rear door or on the podium.

PARTICIPANT FEEDBACK QUESTIONNAIRE

Training on the Hague Child Abduction Convention

Sponsor:
Date:
Place:

We would like your feedback on the training you just attended. This will help us refine the curriculum and evaluate the presenters for future programs. Thank you for taking the time to complete this questionnaire.

1. The goal of this program was to raise the level of knowledge lawyers and judges have about the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act. In your opinion, did the program achieve its objective?

____yes ____no

2. My understanding of the Hague Child Abduction Convention increased:

____not at all ____somewhat ____substantially

3. Overall, I would rate this program:

___ excellent ___ very good ___satisfactory ___ needs improvement

4. Was the presenter effective at teaching his/her subject?

Excellent
Very Good
Satisfactory
Needs Improvement

Overview of the Hague Child Abduction Convention & ICARA

*Presenter

Trying A Hague Return Case

* Presenter

Access Cases

*Presenter

Small Group Role Play:
Trying a Return Case - From Theory to Practice

*Facilitator:

Risk Profiles & Preventing Abductions

*Presenter:

Wrap-Up

*Presenter:

5. The written materials are:

___excellent ___ very good ___ satisfactory ___ need improvement

6. Would you recommend this course to other judges and lawyers?

___ Yes ___No

7. What did you find most useful about this program?

8. What did you find least useful about this program?

9. Other comments:

Please drop this evaluation in the box on your way out or mail to: [insert address].

Chapter 10. APPENDICES

This hard copy appendix consists of:

1. Overheads
2. Resources
3. Trying A Hague Case - From Theory to Practice
4. Hague Convention on the Civil Aspects of International Child Abduction, Senate Treaty Doc. 11, 99th Cong., 1st Sess. 9 (1980), reprinted in 19 I.L.M. 1501 (Nov. 1980) and Federal Register, 51 Fed. Reg. 10498-10502 (March 26, 1986); and Legal Analysis of the Child Abduction Convention 51 Fed. Reg. 10503-10516 (March 26, 1986)
5. International Child Abduction Remedies Act 42 U.S.C. 11601-11610
6. Friedrich v. Friedrich : An Epic Hague Case
Original order of U.S. District Court; FRIEDRICH I, 983 F.2d 1396 (6th Cir. 1993); order of the U.S. District Court on remand from the Court of Appeals; FRIEDRICH II, 78 F.3d 1060 (6th Cir. 1996).

The disk version of the appendix consists of items 1-3. The citations for items 4-6 are identified above. (Note that neither the text of, nor citations to, the two orders of the U.S. District Court in the Friedrich case are available on disk.)

APPENDIX 1. OVERHEADS

APPENDIX 2: RESOURCES

A. Electronic

Websites

http://www.missingkids.com (NCMEC)	National Center for Missing and Exploited Children
http://travel.state.gov	U.S. Department of State, Office of Children's Issues
http://www.hiltonhouse.com	Bill Hilton, certified family law attorney with expertise in interstate and international and interstate child custody jurisdiction, provides vast legal resources, including summaries of Hague cases
http://www.abanet.org/child	ABA Center on Children and the Law

B. Organizations

1. National Center for Missing and Exploited Children (NCMEC) is a national clearinghouse of information and assistance on missing, abducted and exploited children. Parents should call NCMEC if they fear an abduction or if their child is missing. NCMEC also provides booklets and brochures on family abduction (one copy of each provided at no cost) that would be of interest to attorneys. NCMEC processes incoming Hague applications on behalf of the U.S. Central Authority. NCMEC's telephone number is 800-843-5678.
2. State Missing Children Clearinghouses. Almost all states have missing children's clearinghouses that provide educational materials, location assistance, and coordination with law enforcement efforts. Call NCMEC for the telephone number of the clearinghouse in a particular state.
3. State Parent Locator Service may be contacted for information and guidance on using the Federal Parent Locator Service to locate an abducting parent and abducted child. Requests for location assistance may be made only by "authorized persons." The locator service typically is part of the Office of Child Support Enforcement. The Federal Parent Locator Service may be contacted at (202) 401-9267.
4. U.S. Department of State, Office of Children's Issues, provides information on international abductions as well as serving as the U.S. Central Authority under the Hague Child Abduction Convention. The phone number is (202)736-7000.
5. U.S. Department of State, Office of Passport Services, can, under certain conditions, prevent issuance of passports for children and check if passports have already been issued. The telephone number is (202)955-0337 and the fax number is (202) 955-0230.

C. Bibliography

Garbolino, Hon. James D., *International Child Abduction: Guide to Handling the Hague Convention Cases in U.S. Courts*, James D. Garbolino, Auburn, California 1997. For information on obtaining a copy, contact Hon. James Garbolino, Judge of the Superior Court, Placer County, 101 Maple Street, Auburn, California 95603.

Hoff, P., Volenik, A., Girdner, L., *Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention*, Ch. 10, *Juvenile & Family Court J.* 48(2) (Spring 1997). This is a special journal issue containing two bench books pertaining to the civil and criminal aspects of interstate and international child custody disputes and parental kidnapping.

Johnston, J. and Girdner, L., *Prevention of Parent and Family Abduction Through Early Identification of Risk Factors*, Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice

Compendium of the North American Symposium on International Child Abduction: How to

Handle International Child Abduction Cases, Patricia Hoff, ed., Washington, D.C. 1993. The Compendium is available from the Juvenile Justice Clearinghouse for \$17.50 (\$75 for international orders, including Canada). To order, call 800-638-8736 and request document # NCJ 148137.

Family Law Quarterly, Vol. 28 No. 1 (Spring 1994), Special Issue on International Family Law, Patricia Hoff, ed. This issue contains articles on the Convention by Professor Linda Silberman and Professor Carol Bruch.

Final Report: Obstacles to the Recovery and Return of Parentally Abducted Children, eds. Linda Girdner and Patricia Hoff, (Washington, D.C.: United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention (1993)).

International Child Abduction: A Guide to Applying the Hague Convention, with Forms, Second ed., Gloria F. DeHart, ed., ABA Section on Family Law, Chicago, Illinois, 1993. This book may be purchased from the ABA Fulfillment Department in Chicago at (312) 988-5522.

International Parental Child Abduction, U.S. Department of State, Bureau of Consular Affairs. This pamphlet may be obtained free of charge. To request a copy, call (202-736-7000), fax (202-647-2835), write (United States Central Authority, Hague Child Abduction Convention, Office of Children's Issues, CA/OCS/CI, Room 4811, Department of State, Washington, D.C. 20520-4818; or surf the Internet (<http://travel.state.gov>)).

APPENDIX 3. TRYING A HAGUE RETURN CASE - FROM THEORY TO PRACTICE

HYPOTHETICAL CASE SUMMARY

Father (Frank), a citizen of Canada, lives in New York. He is wealthy but has no known occupation. Mother (Molly), a U.S. citizen, lives in Montreal, Canada. She is a waitress. Her erratic work schedule routinely creates day care problems. Child (Charlie), who recently turned 7, is a dual citizen of the U.S. and Canada. He is often left alone after school on account of his mother's job.

Frank and Molly married in California where Charlie was born. When Charlie was 6, the marriage faltered and Frank and Molly separated. Frank moved to New York and Molly moved with Charlie to Montreal where they have lived for about a year. Although Frank has known from the start where Molly and Charlie live, his contact with Charlie has been very limited. He has only visited once, and rarely telephones.

Molly has de facto custody. She never brought action to formalize her physical custody of Charlie. Funds were scarce and she didn't feel the need: Frank never expressed any objection about the custody arrangement. However, Frank started an action in New York for custody, but Molly was not notified of the proceeding. The case is pending. No order has been issued.

Summer vacation was a day care nightmare for Molly because of her increased hours at the restaurant. She was desperate for money and needed the work. She arranged for Charlie to spend July and August with Abby, his paternal aunt, in Quebec, until school resumed. The arrangement worked out well until Abby mentioned to Frank that Charlie was spending the summer vacation with her.

Without consulting Molly, Frank flew to Quebec and took Charlie back with him to New York. Molly found out about it two days later when she made her next scheduled call to Charlie.

Molly called Frank immediately for an explanation. She demanded Charlie's return on the next flight. However, Frank persuaded her to let Charlie stay with him in New York for the rest of the summer. There was some merit to his argument that it made more sense for Charlie to be with his father than with his aunt. Given Frank's minimal contact with Charlie over the last year, Molly only reluctantly agreed. Though it was never stated, Molly assumed that Frank would return Charlie for the start of school in September. He was pre-registered for second grade in Montreal's public schools.

Molly called Charlie twice a week during his visit with Frank. He told her about the great things they were doing, the kids he was meeting, and about the neat new school his father told him he would be going to in the fall. Molly never discussed the matter of the new school with Frank, and always reassured Charlie that he would be home soon.

August ended but Charlie did not come home. A phone call to Frank confirmed her worst fear -- Frank wasn't sending Charlie back!

In fact, Frank had enrolled Charlie in the New School in New York. On the one hand, she could not bear the thought of Charlie not coming right home. On the other hand, she didn't think any harm would come from allowing Charlie to stay with his father for a few months. After all, Charlie sounded well adjusted on the phone. Even though he said he missed her a lot, he was happy in New York and liked the New School so far.

And so Molly did not protest. She needed a few months anyway, as she was moving to a new apartment and starting a new job. She also needed time to end a rocky relationship with an abusive boyfriend.

By Halloween, Molly had tied up all of her personal loose ends.

She called Frank to make arrangements for Charlie's return to her by Thanksgiving, so that he could resume school in Canada without further delay; Her requests fell on deaf ears. She called him daily and wrote him several letters urging him to make arrangements for Charlie's return to Canada. No deal, Frank told her repeatedly. Charlie was not going anywhere! He thought matters were settled, until he was served with Molly's petition for return under the Hague Convention.

-- -- --

How do things turn out for Molly, Charlie, and Frank?

APPENDIX 4. HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: TEXT AND LEGAL ANALYSIS

Hague Convention Text
Senate Treaty Doc. 11, 99th Cong., 1st Sess. 9 (1980), reprinted in
19 I.L.M. 1501 (Nov. 1980) and Federal Register, 51 Fed. Reg. 10498-10502
(March 26, 1986)

Legal Analysis

51 Fed. Reg. 10503 - 10516 (March 26, 1986)

APPENDIX 5. INTERNATIONAL CHILD ABDUCTION REMEDIES ACT

42 U.S.C. 11601-11610

APPENDIX 6. FRIEDRICH V. FRIEDRICH : AN EPIC HAGUE CASE

Two orders of the U.S. District Court, original and on remand; FRIEDRICH I, 983 F.2d 1396 (6th Cir. 1993); FRIEDRICH II, 78 F.3d 1060 (6th Cir. 1996).