Not with my Child

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B J Fadem has been practicing law since 1985. He was certified by the State Bar of California as a specialist in family law in 1999. He has been the senior attorney of The Law Offices of B J Fadem & Associates, APC since 1991. He currently sits on the State Bar Family Law Executive Committee and is the former chair of the Family Law Section of the Santa Clara County Bar Association. He is one of the few attorneys who practice in the area of international family law jurisdiction, including Hague proceedings. He has presented numerous classes and seminars in all areas of family law, including international jurisdiction and The Hague Treaty. His passions are his international practice and serving as minors' counsel in high conflict family law matters.

Over the last decade, international fluidity has increased within our country. Corporations have hired individuals from India, China, Japan, and Pakistan, among others. Other companies have contracted their employees internationally to India, China, etc. Many of these employees have families with children. As a result, there is an increased awareness of international child abduction issues; i.e. one parent chooses to either return to their country, or return to the United States with the children and without the other parent's consent. Often, the scenario is that one parent takes the children on "vacation" and thereafter decides not to return.

As attorneys, it is our job to find the "remedy" or the "solution." The first step is to determine whether the country the child(ren) have been taken to or withheld from is a signatory to the 1980 Hague Convention on the Civil Aspects of International Child Abduction ["The Hague"]. California attorneys can assist parents with Hague proceedings when children are wrongfully abducted or withheld in the United States [California]—as well as assist in obtaining the return of children wrongfully removed from the United States to a "Hague" country. However, many attorneys still believe "The Hague" process is a great mystery—how does it work? What do you do?

The Hague was enacted to prevent international parental abduction between signatory countries and to create a swift, summary proceeding to determine the proper "jurisdiction" to determine custody and visitation and the expedient return of the child to their country of habitual residence. The objectives of the Convention are as stated in Article 1:

> "a) to secure the ***prompt*** [emphasis added] return of children wrongfully removed to or retained in any Contracting State; and
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> 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."

The Hague has been codified by the United States in 22 U.S.C. §§ 9001, et seq.

FIRST SCENARIO: Your client contacts you from Cyprus, which is a signatory country to The Hague. They have been living in Cyprus for the past three years due to Husband's company relocating them. They were married in Cyprus after arriving and she gave birth to their child there. Husband told her that he was going to take the child to the playground by their home; he then advised her that he was going to a friend's home with their child and would return later. Several days later and reports to Cypriot police, Wife discovered that Husband executed a well-thought-out plan to abduct the child back to California. However, Wife is not sure where in California he is. He has family throughout Northern California and he has terminated all communication.

You utilize the resources available through the Office of the District Attorney Child Abduction Unit in the counties you believe the Father may be staying with the child. Your client can assist with advising where various relatives and/or friends may be residing. Once Husband has been located, the District Attorney's office for that county can assist.

The Filing: Wife must file a Hague Petition for Return of the Child with the Central Authority of the country. It is usually best to advise the client to report the abduction to their local law enforcement agency as well as immediately contacting their "Central Authority" to initiate the petition

as soon as possible. The District Attorney can provide resources to facilitate service of the petition.

In California, a Hague Petition for Return is first sent from the Central Authority of the left-behind country to the Office of Children's Issues in Washington D.C. They then determine in which state the child is located and send the Petition to the Attorney General of that state. The Attorney General, in turn, submits it to the District Attorney's office for that county, which then files it in the family court. A private attorney can draft and file a Petition for Return directly with the family court in the county where the child has been located. However, by allowing the District Attorney's office to file the petition, your client saves legal fees for the drafting and filing of the petition, the service, the translations, etc. In addition, the District Attorney will file it in *state* court. However, Hague Petitions are unique in that both state *and federal* courts have jurisdiction. The District Attorney's office serves as a neutral "friend of the court;" it is not allowed to advocate for either party. It also can only participate in a Hague Petition in *state* court. Ergo, the District Attorney's office will always file the petition in state family court.

Either party may thereafter remove the case to federal court. This may be an advantage considering the venue and judges familiar with jurisdiction and Hague matters. However, because Hague proceedings are the only "family law" issue entertained by federal courts, federal judges may be less familiar with the issues than a state court judge. Some counties are assigning "Hague" judges to hear all Hague Petitions for their county.

If the District Attorney's office prepared and filed the initial Petition for Return, the private attorney should review and determine whether to file supplements, such as: Supplemental Affidavit of the client with additional details and facts; Affidavits of witnesses from the country of habitual residence [doctors, teachers, neighbors, family, child care providers, etc.], documents [medical records, school records, photographs, etc.]. The most unique aspect of a Hague proceeding is that *any document filed with or pursuant to the Petition is admissible without further authentication.* Hearsay is not a valid exception in a Hague proceeding. Article 30 of The Convention; 22 U.S.C. § 9005. However, the documents must be submitted as certified with certified translations.

The Proceedings: The International Child Abduction Remedies Act (ICARA) 22 U.S.C. §§ 9001 et. seq. authorizes either a federal or state court in which a child is located to issue an order requiring the return of that child to another signatory nation if the court first determines that the child was a habitual resident of the other nation and that the child was wrongfully removed from the nation. *Wipranik v. Superior Court (Wipranik),* 63 Cal. App. 4th 315 (1998). The purpose of the Hague Convention was also mentioned in *In re Marriage of Forrest & Eaddy*, 144 Cal. App. 4th 1202, 1210 (2006) as "'to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.' (Convention, Preamble; see *Mozes v. Mozes,* 239 F.3d 1067, 1069–1070 (9th Cir. 2001))."

The only function of a proceeding under the Convention is to decide whether a child should be returned to the country of the complaining parent; it does not govern the *merits* of parental custody disputes, but leaves those issues for determination by appropriate proceedings in the child's country of habitual residence. Convention, Arts. 16, 19; 22 U.S.C. § 9001(b)(4); *Croll v. Croll,* 229 F.3d 133, 137 (2d Cir. 2000) fn. omitted; *Friedrich v. Friedrich,* 78 F.3d 1060, 1063 (6th Cir. 1996) (*Friedrich II*), cited in *Forrest and Eaddy.*

The preliminary issues to consider before even entertaining a Petition under The Hague are: (1) For a "mandatory" return, the petition must be filed within one year of the wrongful removal or retention. A petition filed after one year is discretionary with the court and will depend upon the length of time elapsed since the removal and whether the child has re-acclimated to the new country; (2) The child must be under the age of sixteen years *at the time of the proceedings;* if not, the Hague does not apply; (3) All proceedings regarding custody and visitation in either country are stayed pending the resolution of the Hague proceedings; and (4) Pursuant to Article 19 of the Convention, a Hague proceeding is a summary proceeding to determine *jurisdiction only*—it is not an evidentiary custody hearing and the court cannot consider the child's "best interests." The court determines only 1) the child's country of habitual residence, 2) was the child wrongfully removed or retained and if so, 3) that (absent a finding of an exception) the child must be returned to their country of habitual residence.

The "left behind parent" must first establish the child's country of habitual residence by a preponderance of the evidence. "Habitual residence," refers to the child's customary residence for at least six months prior to the

wrongful removal or retention. *Miller v. Miller*, 240 F.3d 392, 400 (4th Cir. 2001), citing *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) (*Friedrich I*). In *Forrest and Eaddy* at 1213, the Fourth District said that

> "the analysis of this issue begins with an examination of the intent of the person or persons entitled to determine where the child lives. (*Mozes v. Mozes, supra*, 239 F.3d at pp. 1073–1075.) If the child has not yet reached a stage in her development that she is deemed capable of making an independent decision about her living arrangements, the parents' last shared intent as to the child's residence is frequently determinative, provided that that intent has been carried out for an appreciable period of time. (*Id.* at pp. 1076–1078; *Gitter v. Gitter* (2d Cir.2005) 396 F.3d 124, 132–134; *Holder v. Holder, supra*, 392 F.3d at pp. 1016–1017.)"

The most common argument raised in opposition to the left-behind parent's attempt to establish the child's habitual residence is that the removal was only a "temporary absence" from that country. This argument is fact-driven to determine the focused intention of the parties. Even a "temporary absence" from the United States for five years can re-establish the country of habitual residence. The judgment of the Ninth Circuit Court of Appeals in *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) has been most persuasive with regard to such a determination in stating that there should ordinarily be a "settled intention" to abandon an existing habitual residence before a child can acquire a new one. This approach has also been adopted by the Second and Seventh Circuits. "It should be noted that within the *Mozes* approach the Ninth Circuit did acknowledge that given enough time and positive experience, a child's life could become so firmly embedded in the new country as to make it habitually resident there notwithstanding lingering parental intentions to the contrary." [INCADAT Reference: HC/E/USf 301]

Once the court has determined the child's country of habitual residence, the left-behind parent must then prove by a preponderance of the evidence that he or she was "exercising custody" at the time of the wrongful abduction or retention. This does not require "custody" orders from the country of habitual residence; however, if, such orders were issued prior to the abduction/retention, it is extremely important to obtain certified copies and certified translations of such orders and register them, along with pursuing the petition. Most cases of parental abduction involve parents residing together immediately before the taking/retention; as such, the exercise of custodial rights is evident.

The last portion of the left behind parent's *prima facie* case involves establishing that the child was "wrongfully" removed or retained. The removal or retention of a child is to be considered "wrongful" pursuant to the Convention where it breaches the Respondent's rights of custody, provided that the Respondent was exercising those rights at the time of the retention or removal. Convention, Art. 3; 22 U.S.C. § 9003(e)(1)(A); *Shalit v. Coppe*, 182 F.3d 1124, 1127–1128 (9th Cir. 1999); *Wipranik v. Superior Court*, 63 Cal. App. 4th 315, 321 (1998). The most common arguments raised with regard to this issue is that the left behind parent "consented" or "acquiesced" to the removal or retention of the child. However, the burden of proof for the left behind parent is "preponderance."

An order for the child's return is *mandatory* if the petition was filed within one (1) year once the parent makes a *prima facie* case establishing: (1) The child's country of habitual residence; (2) That the left behind parent was exercising their custodial rights at the time of the removal/retention; and (3) The removal/retention was wrongful. Thereafter, to avoid an order of return, the burden shifts to the other parent to prove an exception to the return. The most common are those established under Article 13, Article 13(b) and Article 20. Such exceptions must be proven by clear and convincing evidence.

Article 20: The parent objecting to return must prove that to return the child to their country of habitual residence would violate "human rights and fundamental principles." This exception is rarely used because it requires the country to which the child was removed be so volatile or "war torn" as to violate our sense of humanity. Such countries are rarely signatories to The Hague.

Article 13: The child [still under the age of sixteen] is of an age mature enough and *refuses* to return. This would require the court's determination of whether the child is "mature" enough and that the child "refuses" to return, not merely "doesn't want to" return.

Article 13(b): This is the most commonly used exception to return pursuant to The Hague. Article 13(b) provides that return need not be ordered 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." Currently, parents are utilizing allegations of domestic violence to establish an exception to the child's return—claiming that the domestic violence

by the left behind parent poses a grave risk of harm to the child should they be returned. Most recently, *Noergaard v. Noergaard,* 244 Cal. App. 4th 76 (2015) established that upon an allegation of domestic violence pursuant to an Article 13(b) exception, the court must allow an evidentiary hearing to determine the "grave risk of harm."

Contrary to a lot of misunderstanding of this case, it does not establish that domestic violence *automatically* triggers the exception. If the country of habitual residence has sufficient resources and safeguards to protect the child from domestic violence, the court must consider that. However, *Noergaard* has created a quagmire in that a Hague Petition was always meant to be decided in a "summary" proceeding to determine the appropriate jurisdiction for custody; however, *Noergaard* has added a requirement of an "evidentiary" hearing. Regardless, I believe that even if the "removing" parent establishes by "clear and convincing" evidence that domestic violence occurred, the court must still consider whether there are sufficient resources and safeguards in the country of habitual residence so as not to prevent the child's return. The *Noergaard* case has created much controversy among attorneys in this regard. If the "removing" parent is presenting an Article 13(b) exception for domestic violence, it would be prudent to obtain an expert from the country of habitual residence to establish the laws and resources that are in place to protect victims of domestic violence.

If the court orders the child returned to their country of habitual residence, the left-behind parent may request an order for costs and fees related to facilitating the return: legal fees, litigation costs, and transportation costs—including the transportation costs to return the child. 22 U.S.C. § 9007.

SECOND SCENARIO: Your client and Wife were married in California. He has resided in California for ten years and his wife for three years. Her family continues to live in Canada and Pakistan. Their son was born in California. He advises you that Wife took their son to visit her family in Canada [a signatory to The Hague] and has now told him they will not be returning. She has terminated all communication. How can you assist from California?

Often these left-behind parents are frantic and completely lost. They have no idea what their options are or who to contact. As an attorney, we can actually assist a lot from California. The first step is to ensure that the client has advised the appropriate agencies and initiated the steps towards a Hague proceeding in Canada. He should report the abduction to the District Attorney's office in their county. In addition, the Office of Children's Issues in Washington, D.C. should be contacted. They will assist your client in preparing, filing and serving the Petition for Return of the Child pursuant to The Hague. It is imperative that he retain counsel in Canada familiar with The Hague. Again, most clients will turn to you as their local attorney to assist them in this search. The International Academy of Family Lawyers can be very helpful in this regard.

Once a Hague proceeding is initiated in Canada, California counsel can serve as the "counter-part" to the attorney in Canada: assisting in obtaining the necessary documents, affidavits and translations, if needed. California counsel may also serve as an "expert" regarding California law and resources to the Hague proceeding in Canada. If an Article 13(b) exception for domestic violence is raised, the California attorney can be especially helpful in providing the court with the laws and resources available in California to protect victims of domestic violence.

In addition, California counsel can petition and obtain a declaration from the California court pursuant to Article 15 of the Convention declaring the United States as the child's habitual country of residence. Finally, as your client's attorney in California, be prepared to react quickly upon the receipt of a "Return Order" from Canada to immediately obtain the necessary emergency temporary orders from California upon the child's return.

In light of the current climate of our country and our government, fear is escalating in communities of those that have been "domiciled" in this country for years but may face involuntary ouster, leaving the children at risk. The future is very unsure and it has been the goal and objective of The Hague Convention since 1980 to protect against and ensure the expedient return of children that have been abducted by a parent internationally to a signatory country.