



International Family Law
Child Abduction Proceedings
February 2016



HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

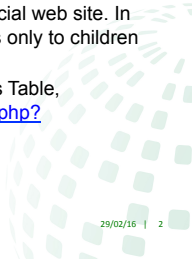

- The primary purpose of the Convention is to preserve the status quo of whatever child custody arrangement existed immediately before an alleged wrongful removal or retention deterring a parent from crossing international boundaries in search of a more sympathetic court.
- Issue is jurisdiction - **not** what is best for the child



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WHO IS GOVERNED

- Only nations which have signed on and entered into this treaty are bound by it. It is critical to stay current with the status of member States, which you may do by checking the official web site. In addition, the Convention applies only to children under the age of 16.
- See Hague Convention Status Table, http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24.



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CENTRAL AUTHORITY

- The Convention requires member States to establish a central authority to assist in the return of children wrongfully removed from their home states. Links to the central authority of each member State may be found at <https://www.hcch.net/en/instruments/conventions/authorities1/?cid=24>.


HABITUAL RESIDENCE

- Habitual residence is the most fundamental element of the application of the Convention. The determination of the child's habitual residence is the triggering element of the Convention. Habitual residence is not defined in the Convention.
- It is a construct much more flexible than the mere standard of time, 6 months, as is found in the UCCJEA

THE HAGUE CONVENTION ESTABLISHES FIVE DEFENSES TO THE RETURN OF A CHILD WHO HAS BEEN WRONGFULLY TAKEN FROM ITS HABITUAL RESIDENCE:


- The proceeding is commenced in the responding state more than one year after the wrongful removal or retention, and "the child is now settled in its new environment" (Article 12);
- That human rights and fundamental freedom would be abridged if the return were permitted (Article 20);

- The party now seeking return of the child "was not actually exercising custodial rights at the time of the wrongful removal or retention, or had consented to or subsequently acquiesced in the removal or retention" (Article 13 (a));
- The return of the child "would expose [him or her] to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13(b)); or
- The child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views" (Article 13 (b)).

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BURDEN OF PROOF

- A respondent who opposes the return of the child has the burden of establishing by clear and convincing evidence that one of the exceptions set forth in Articles 13(b) or 20 of the Convention applies, and, by a preponderance of the evidence, that any other exception set forth in Article 12 or 13 of the Convention applies. International Child Abduction Remedies Act, 22 U.S.C. § 9003(e).

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ONE YEAR

- When a child has been "wrongfully removed" or "wrongfully retained" within the meaning of Article 3 of the Convention, and the date of commencement of the judicial proceedings in the place where the child is found is less than one year from the date of the wrongful removal or retention, the child must be returned.
- There is no definition for when a removal or retention becomes unlawful. That is a question of fact for the court to determine.

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FUNDAMENTAL HUMAN RIGHTS

- The return obligation of Article 12 is limited by Article 20, which states: "the return of the child under the provisions of Article 12 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."



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CONSENT OR ACQUIESCENCE DEFENSE (ARTICLE 13(A))

- The judicial authority may deny an application for the return of a child if the person "having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention, or had consented to or acquiesced in the removal or retention" under Article 13(a). This exception derives from Article 3(b), which makes the Convention applicable to the breach of custody rights that were actually exercised at the time of the removal or retention, or which would have been exercised but for the removal or retention.



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"GRAVE RISK OF HARM" DEFENSE (ARTICLE 13(B))

- In accordance with Article 13(b), a child will not be ordered returned where "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."
- What is an intolerable situation and how do we stay away from a best interests examination?



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**“WISHES OF THE CHILD” DEFENSE
(ARTICLE 13(B))**

- A court may in its discretion refuse to order the return of the child “if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.” There is no defined age for determination.