

# **SILENT PARTNER**

## **CUSTODY ENFORCEMENT -- INTERNATIONAL**

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain basic concepts about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

Prompt and effective advice in cases involving potential or past parental kidnapping is essential in the legal assistance office. The remedies in such cases are governed by the Uniform Child Custody Jurisdiction Act, the federal Parental Kidnapping Prevention Act (28 U.S.C. 1738A), and the Hague Convention on the Civil Aspects of Intercountry Abduction. Additionally, Army legal assistance attorneys should be familiar with the provisions of AR 608-99, providing for the return of children by servicemembers and family members when a court order for return is involved.

As with domestic enforcement, the true "bottom line" in these cases is determined by whether the client (usually mom) has a court order. If she does, then there are some good tools that can be used to help get the child back. If there's no order – perhaps just an unincorporated separation agreement or, worse yet, no documents at all – then there's a lot more work that needs to be done. The law gives both parents, in the absence of a written instrument to the contrary, equal rights to a child of theirs.

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### **CHECKLIST ON CHILD-SNATCHING**

By Mark E. Sullivan

[NOTE: The following is adapted from an article in the ABA Legal Assistance Newsletter (now called The LAMPlighter), No. 27 (Fall 1986)]

When Sergeant and Mrs. Smith separated, Mrs. Smith became increasingly concerned about SGT Smith's threats to kidnap the children if she demanded "too much child support." She comes to you for advice and assistance to stop a possible child-snatching situation. Fast action and competent advice are essential in such a situation. What should you advise? The following items cover some pointers, problems, answers and questions in this troublesome area.

1. In nearly all states, Mrs. Smith will need a court order to provide effective help. An unincorporated private contract, often called a "separation agreement," just won't do. Violation of contractual custody provisions may, perhaps, give rise to a remedy involving money damages for breach of contract or the tort of alienation of affection. But does Mrs. Smith want money for the stealing of her children? No - she wants her children back! As a general rule, all of the effective remedies that Mrs. Smith will want to try to use depend on court orders and decrees, not private contracts.

2. You must advise Mrs. Smith that you cannot stop a child-snatching. You can try to give her as many remedies or prevention measures as possible, but no one can stop a kidnapping. As a practical matter, no court order or separation agreement can stop something from happening, but a well-drafted court order can be the first and most important step toward preventing a child-snatching and providing remedies allowing the return of a stolen child by a non-custodial parent.

3. Find out the facts about the threats alleged by Mrs. Smith. Is SGT Smith threatening to take the children "back home" to his parents? Is he "on orders" back to the states and, if so, does he have their

passports? Do the children have their fingerprints on file or in Mrs. Smith's possession? Gathering all the facts (or as many as possible) at this point will be very helpful in deciding what kind of a court order Mrs. Smith needs and what specific clauses it should contain, as well as what interim preventive measures she should immediately undertake.

4. The U.S. Department of State receives nearly 3,000 reports annually of actual or expected abductions. About 1,000 of these involve children of dual nationality. The State Department has set up a Namecheck Clearance System as a lookout system for the denial of U.S. passports. While it's not a passport use tracking system, it does provide information to a parent or court about when a passport application is submitted on behalf of a child.

The System works in two ways. If the State Department has on file a court order that prohibits travel outside the U.S., grants custody to the parent who isn't applying for a passport, or grants joint custody to both parents, then the passport will be denied. If the State Department has on file a written request for information for a parent, guardian or court, then the Department will notify that parent, guardian or court if a passport application has been submitted for a child. The Namecheck Clearance System remains effective until the child turns 18 or a written request is made to end it. Changes in address, phone number or name should be made in writing.

You can also use the System to request information on the issuance of a passport to or for a child. The written request must include -- the child's full name, his or her date and place of birth, your name, address and telephone number. If there is a court order giving your client custody of the child, include that also (a certified copy is not required). You should also include any of the following helpful information: other names by which the child is known; where the child is located at present; where the other parent resides; whether an American passport has been previously requested (and, if so, the previous passport number), and that status of any court case between you and the other parent. In order to deny a passport, the State Department must be provided with a court order that --

- > Grants your client full custody; or
- > Grants joint custody to both parents (in which case both parents must consent before a passport will be issued); or
- > Places limits on a child's travel, such as requiring that the child not leave the United States; or
- > Requires that both parents (or the court) agree to the child's obtaining a passport or traveling outside the United States.

The Namecheck Clearance System is located at: Office of Passport & Advisory Services, 1111 19th Street NW, Suite 260, Washington DC 20522-1705. You may fax a request to: 202-955-0230.

If the child has dual citizenship, as when one of the parents is a not a U.S. citizen, it is important to remember this in the passport application process. Simply because a child can't get a U.S. passport does not mean that he or she cannot travel abroad on another nation's passport. If the client's child has another nationality, be sure to contact that country's embassy or consulate to ask about procedures for denial of a passport for that country (or notification of application). There is no requirement that other countries or their embassies comply with U.S. laws and regulations as to the issuance or denial of their passports to U.S. citizens who are children with dual nationality.

For more information, call the State Department's Bureau of Consular Affairs at 202-955-0231 and ask for "the duty officer." In addition, if you have access to a computer and an on-line service, you can get information on the Internet at the following home page: **[http://travel.state.gov/passport\\_assistance.html](http://travel.state.gov/passport_assistance.html)**. For information on international child abduction, contact the Office of Children's Issues at 202-736-7000, or go to their home page at **<http://travel.state.gov>**.

5. In addition, it would be wise to advise Mrs. Smith to go ahead and get the passports for the children and keep them in her own safe deposit box or in some other secure place.

6. Also be sure to advise Mrs. Smith of the possible resources and assistance available through the National Center for Missing and Exploited Children, 1835 K Street, Suite 700, Washington, DC 20006. The Center's toll-free hotline number is 1-800-843-5678. Mrs. Smith should also be informed of the

importance of registration of her court order under provisions of the UCCJA in her local jurisdiction and in any jurisdiction where SGT Smith presently resides or might reside in the future, as well as possible criminal remedies under state law.

7. As an additional preventive measure, a certified copy of the custodial court order should be provided to each school which Mrs. Smith's children attend. Finally, the children should be taught how to telephone home, including the solicitation and use of operator assistance.

8. Once you have done this, you have covered the basics. There is still a great deal to do in advising Mrs. Smith about the specific facts and state laws concerning her particular case. With this Checklist at your right hand, you have a good starting point for effective counseling on child snatching.

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## TJAGSA Outline on International Custody Enforcement

### 1) INTRODUCTION

#### a) References

- i) Convention on the Civil Aspects of International Child Abduction, done at The Hague, October 25, 1980; text reprinted at 51 Fed. Reg. 10498 (1986).
- ii) International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988).
- iii) H. Rep. No. 525, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S. Code, Cong. & Admin. News 386-403.
- iv) Interim Regulations implementing Pub. L. 100-300: 22 C.F.R. Part 94, 53 Fed. Reg. 23608 (1988).
- v) Fed. Reg. 10503 (State Department's analysis of the Convention) (1986).

#### b) Overview of the Convention.

##### i) Purposes of the Convention. Article 1.

- (1) To secure the prompt return of children wrongfully removed to or retained in any Contracting State.
- (2) To ensure that rights of custody and access created by the law of one Contracting State are effectively respected in the other Contracting States.

##### ii) Definitions.

- (1) Contracting States--those which have ratified the Convention.
- (2) Rights of custody--the right to make decisions regarding the child's care, particularly where the child will live. Article 5.
- (3) Rights of access--the right to take a child for a limited period of time to a place other than the child's habitual residence. Article 5.
- (4) Wrongful removal or retention--a breach of custody rights that are attributed to a person or an institution, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention. The right of custody may arise from:
  - (a) Operation of law of the State where the child was habitually resident.
  - (b) A judicial or administrative decision.
  - (c) An agreement having legal effect under the law of the State where the child was habitually resident.
  - (d) Any other relevant source. -- Article 3.

- (5) Child--one who has not yet reached his or her 16th birthday. Article 4.
- (6) Central Authority--each Contracting State is required to establish a central point of contact to coordinate and oversee actions undertaken in compliance with the Convention. Article 6.

iii) Central Authority responsibilities. Article 7.

- (1) Help discover where the child is located.
- (2) Take appropriate measures to prevent further harm to the child or prejudice to the parties.
- (3) Secure the voluntary return of the child if possible and assist in the amicable resolution of other issues.
- (4) Exchange information on the social background of the child and the local law regarding rights of custody.
- (5) Make appropriate administrative arrangements to ensure the child's safe return.
- (6) Provide legal representation for the aggrieved party or assist that party arrange for legal representation.
- (7) Cooperate with other Central Authorities.

c) **How the Convention Works.**

i) Remedies for Wrongful Removal or Retention.

- (1) The Central Authority of the State where the child is shall take all appropriate measures to obtain the voluntary return of the child. Article 10.
- (2) The authority of the Contracting State shall order the return of the child forthwith in cases of wrongful removal or retention initiated within 1 year of the removal or retention. Article 12.
- (3) The authority of the Contracting State shall order the return of the child forthwith in cases of wrongful removal or retention initiated more than 1 year after the removal or retention unless it is demonstrated that the child is now settled in its new environment. Article 12.
- (4) This means that litigation will be required if voluntary action cannot be achieved.
  - (a) In the U.S., the lawsuit will take place in state courts or in federal courts. See § 4(a), Pub. L. 100-300.
  - (b) The party seeking the child's return will have to retain counsel or attempt to get the state child protective services involved.
  - (c) A Central Authority can request an opinion from the Central Authority of the child's habitual residence to determine whether the removal or retention was wrongful.

ii) Defenses to the Requirement to Return the Child.

- (1) The removal or retention was not in fact "wrongful" under the law of the child's habitual residence.
- (2) The child is over the age of 16.
- (3) The person or institution seeking the child's return was not actually exercising rights of custody at the time of the removal or retention. Article 13.
- (4) The person or institution seeking the child's return consented to or acquiesced in the removal or retention. Article 13.
- (5) There is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise would place the child in an intolerable situation. Article 13.
- (6) The child objects to being returned and has attained an age and maturity so that it is reasonable to take the child's desires into account. Article 13.
- (7) The child's return may be refused if it is not permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. Article 20.
- (8) Note: the authority hearing the case shall consider information on the child's social background that is provided by the Central Authority of the child's habitual residence.

iii) Relationship Between Convention Responsibilities and Child Custody Adjudications.

- (1) The sole fact that the wrongfully removing or retaining person has obtained a valid custody order is not in itself a basis for refusing to order the child's return. Article 17.
- (2) Once a Contracting State receives notice that a child in its jurisdiction has been the subject of a wrongful removal or retention, judicial or administrative authorities of that state shall not decide on the merits of the rights of custody unless:
  - (a) It has been determined that the child will not be returned; or
  - (b) An application for the child's return has not been received within a reasonable time following the receipt of the notice.
  - (c) The Convention does not address the merits of custody disputes, choice of law issues, or rules for which court should exercise jurisdiction in child custody matters.

iv) Enforcing the Rights of Access. Article 21.

- (1) Rights of access are not subject to mandatory enforcement actions as are rights of custody.
- (2) Essentially, Central Authorities may take all appropriate actions to effectuate access rights.

v) Practical Aspects.

- (1) Methods of proceeding.
  - (a) A party seeking a child's return can start by contacting the Central Authority in his or her own country or by contacting the Central Authority of the nation where the child is located.
  - (b) An alternative may be to bypass the Central Authorities and initiate litigation in the courts of the country where the child is located.
    - (i) This is authorized by § 4(b) of Pub. L. 100-300.
    - (ii) Probably not the best approach; Central Authorities can provide valuable assistance.
      1. Locating the child.
      2. Obtain an opinion as to wrongfulness.
      3. Obtain information on the child's social background in the State of habitual residence.
      4. Monitor proceedings to ensure timely action.
      5. Assist in arranging representation, including pro bono representation.
      6. Help negotiate voluntary return.
      7. Coordinate with child protection agencies for foster care and other efforts to protect the child.
    - (iii) In any event, assertion of custodial rights should be made as soon as possible after the wrongful removal or retention.
  - (c) Relationship with other statutes.
    - (i) The Convention and the federal implementing statute are not exclusive remedies for international child abductions.
    - (ii) For cases involving children removed or retained in the U.S., the UCCJA may provide a better remedy than the Convention, especially if a custody order exists.
    - (iii) For cases involving children in other countries, there may be domestic law similar to the UCCJA.
- (2) Additional Assistance -- The U.S. Central Authority is the Office of Citizens Consular Affairs in the Department of State. The address is: Office of Citizens Consular Affairs, Department of State, Washington, DC 20520 [Phone: 202-955-0231]

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## **I. MILITARY SPECIFIC REQUIREMENTS REGARDING CHILD CUSTODY [adapted from tjagsa outline]**

### **A. Army Regulation 608-99.**

1. The Army has promulgated a policy on child custody and parental kidnapping. Commanders must assist in cases where soldiers have wrongfully taken or retained custody of a child. Para. 1-4e(10); AR 608-99.
  - a. Inform the victim parent of soldier's port-call, future duty assignment, and/or child's general whereabouts.
  - b. May, after consultation with SJA, reveal soldier's home address.
2. Abduction of a child: to be a violation. . .
  - a. there must be a preexisting court order establishing custody rights in another individual, and
  - b. the soldier must know of its existence and act in disregard of its provisions. Para. 2-5a, 2-5b; see 112 Mil. L. Rev. at 56-57.
  - c. Exception: illegitimate children. Para. 2-5b.
3. Withholding, detaining, or concealing a child: to be a violation
  - a. a court order must have been issued giving the complaining party custody, and
  - b. the soldier continues to withhold, detain, or conceal the child after learning of the order. See 112 Mil. L. Rev. at 56-57.
4. Regulation applies to wrongful abduction, withholding, etc. of children-relatives of the soldier.
  - a. Children by birth or adoption
  - b. and also wards, siblings and stepchildren
  - c. who are unmarried and under 14 years old.
5. The regulation does not specifically address situations where the soldier's spouse has abducted or withheld a child.

### **B. Joint custody decrees. See 112 Mil. L. Rev. at 57.**

1. Violation still possible if the order gives each parent the exclusive right to custody or possession or visitation for specified periods.
2. Violation also possible by wrongfully detaining or concealing the child to the prejudice of the other parent's legal rights.
3. Army policy. 112 Mil. L. Rev. at 58.
  - a. Assist in returning the child to the lawful custodian.
  - b. But do not over-react, especially in cases where there has been a long delay in requesting the child's return or where there genuinely appears to be problems in the home the child is to be returned to.
  - c. Take no punitive action when faced with conflicting court orders.

### **C. Sanctions for violations. Para. 1-7.**

1. The full range of administrative sanctions are available.

2. The abduction and withholding/detaining/ concealing provisions are punitive.
3. Prosecution under the Assimilative Crimes Act is also possible.
4. But a soldier can avoid punishment under the regulation by voluntarily returning the child to the lawful custodian within 96 hours of receiving a demand for the child's return. Para. 2-5d(2).

#### D. DOD Guidance

1. Citations.
  - a. National Defense Authorization Act for Fiscal Year 1989, Public Law 100-456, ' 721 (1988).
  - b. Department of Defense Directive 5525.9, 32 C.F.R. Part 146
2. Statutory provision.
  - a. [T]he Secretaries of the military departments [shall issue] uniform regulations...to provide for the delivery of members of the Armed Forces to civilian authority when such members have been accused of offenses against civil authority. Such regulations shall specifically provide for the delivery of such members to civilian authority, in appropriate cases, when such members are accused of parental kidnapping and other similar offenses, including criminal contempt arising from such offenses and from child custody matters, and shall specifically address the needs...when members ...assigned overseas are accused of offenses by civilian authorities.
3. Excerpts of DOD Dir. 5525.9.
  - a. Court. Any judicial body in the United States with jurisdiction to impose criminal sanctions on a DOD member, employee, or family member.
  - b. Felony. A criminal offense that is punishable by incarceration for more than 1 year, regardless of the sentence that is imposed for commission of that offense.
  - c. Para. D, Policy. It is DOD policy that: With due regard for mission requirements...the Department of Defense shall cooperate with courts and State and local officials in enforcing court orders relating to DOD members and employees stationed outside the United States, as well as their family members who accompany them, who have been charged with, or convicted of, a felony in a court, have been held in contempt by a court for failure to obey the court's order, or have been ordered to show cause why they should not be held in contempt for failing to obey the court's order.
  - d. Para. F, Procedures: (a) On receipt of a request for assistance from a court, or a Federal, State, or local official concerning a court order . . . , the [DOD Component] shall determine whether the request is based on an order issued

by a court of competent jurisdiction. Attempts shall be made to resolve the matter to the satisfaction of the court without the return of . . . the member, employee, or family member (subject). Before action is taken under this section, the subject shall be afforded an opportunity to provide evidence of legal efforts to resist the court order, or otherwise show legitimate cause for noncompliance. If . . . such efforts warrant a delay in taking action, the [DOD Component] may grant a brief delay (not more than 90 days). All delays promptly shall be reported to . . . [the DOD General Counsel].

(1) If the request pertains to a felony or to contempt involving [parental kidnapping in violation of a custody decree], and the matter cannot be resolved with the court without the return of the subject to the United States, the [DOD Component] shall promptly take action prescribed in paragraphs (b) through (d) of this section.

(2) If the request does not pertain to a felony or [parental kidnapping] . . . , the [DOD Component] shall take action prescribed in paragraphs (b) through (d) when deemed appropriate with the facts and circumstances of each particular case.

(a) If a DOD member is the subject, the member shall be ordered to return expeditiously to an appropriate port of entry at Government expense, contingent on the party requesting return providing transportation, and escort, if desired, of the member from such port of entry to the jurisdiction of the party.

(b) If a DOD employee is the subject, the employee strongly shall be encouraged to comply with the court order. Failure to respond to the order may be the basis for adverse action against the DOD employee.

(c) If a family member is the subject, the family member strongly shall be encouraged to comply with the court order.

4. DA implementing guidance -- Compliance of DOD Members, Employees, and Family Members Outside the United States With Court Orders, 32 C.F.R. Part 589. See, Chapter 4, AR 608-99.

E. International Application of UCCJA

1. UCCJA Sec. 23. The UCCJA applies internationally if:

- a. There was reasonable notice, and
- b. The international jurisdiction has laws substantially similar to the Act, and

- c. An opportunity to be heard was given to all affected persons.
- d. Examples:

(1) Middleton v. Middleton, 314 S.E. 2d 362 (Va. 1984) (Virginia Supreme Court applied UCCJA to two international custody disputes, finding that England was a "state" within the meaning of the UCCJA and that its jurisdictional rules were substantially similar to the UCCJA).

(2) Klont v. Klont, 342 N.W. 2d 549 (Mich. App. 1984) (Michigan trial court should have deferred to a pending custody proceeding in West Germany).

F. Dorrity v. Dorrity, 695 So.2d 411 (Dist. Ct. of App. Florida 1997), rehearing denied June 10, 1997. Charles Dorrity, an Army member, married a German national and they had a child. Prior to ETS, they moved to Florida. After 6 weeks, Charles put his wife on a plane back to Germany and filed for custody in Florida based on emergency. His wife filed in Germany and Germany issued a custody order. Florida issued a custody order in favor of Charles. The appellate court ruled that Germany was the state of jurisdiction and Florida's order was without jurisdiction.

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## **INTERNATIONAL PARENTAL KIDNAPPING**

[NOTE: This article was written in 1989 by then-Major Jeffrey S. Guilford, who was Chief, Legal Assistance Branch, TJAGSA]

### *Overview*

Parental kidnapping has received a surprising degree of congressional attention. In addition to creating the Parental Kidnapping Prevention Act of 1980 (28 U.S.C. § 1738A), Congress recently ordered DOD to develop a uniform policy for responding to arrest warrants arising from illegal parental kidnapping perpetrated by members of the Armed Forces. Even more significantly, last year Congress enacted the International Child Abduction Remedies Act (the Act), Pub. L. 100-300, 102 Stat. 437 (1988), which implements the Hague Convention on the Civil Aspects of International Child Abduction. So far, this multilateral treaty has been ratified by 10 of the 29 signatory nations: Australia, Canada (all provinces except the Northwest Territory), France, Hungary, Luxembourg, Portugal, Spain, Switzerland, the United Kingdom, and the United States. This note briefly discusses the Convention, which is now federal law.

Legal assistance attorneys need answers to four questions that arise under the Convention. First, who is covered by the protections and procedures that it creates? Second, what types of wrongdoing are addressed? Third, what remedies are available? And, finally, how can the treaty be invoked?

### *Who Is Covered?*

The Convention's ultimate beneficiaries are children who have been wrongfully abducted or retained or who have been denied the opportunity to visit with a noncustodial spouse. Nevertheless, the protections are invoked by parents or other custodians and not by the children themselves. Thus, it is fair to say that the Convention protects people (or institutions) who legally exercise custody over children. "Custody" means the right to make decisions relating to the care of the child, especially the right to determine the child's place of residence. The fundamental prerequisites for invoking the Convention are the legal right to custody and the actual exercise of that right (or a showing that custody would have been exercised but for the child's wrongful abduction).

Since custody is the key, it is important to note that custody can exist even if the child is not living with the custodian. For example, suppose a custodial parent allows a child to live with grandparents for a brief period; in this case, the parent has exercised the right to determine the child's place of residence, and that is the essence of custody under the Convention.

The Convention applies to children under the age of 16 who were habitually resident in a Contracting State (i.e., one that has ratified the Convention) at the time of the wrongful abduction or retention. Once a child reaches his or her 16th birthday, the Convention no longer applies, and this is so even if the child is in an abducted status at that time. The Convention is designed to supplement other relevant laws rather than supercede them, however, and an aggrieved custodian may seek the return of such a child under the Uniform Child Custody Jurisdiction Act or similar domestic law of the jurisdiction where the child is found even when the Convention is no longer applicable.

The Convention also addresses wrongful denial of access rights, and "access" is defined as the right to take a child for a limited period of time to a place other than the child's habitual residence. Thus, the Convention seeks to protect visitation rights in addition to custody rights, but the enforcement mechanism for access essentially is hortatory. The primary focus is returning wrongfully abducted or retained children to custodians.

### *What Constitutes A Wrongful Act?*

An abduction (or "removal") or retention of a child is wrongful under the Convention if is a "breach of custody rights attributed to a person, an institution or any 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;...the rights of custody...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." Convention, Article 3.

There are several important aspects to this definition of an actionable wrong. The first point is that the three listed sources of custody rights are not exclusive; any legal custody right is protected.

Moreover, the Convention can apply despite the absence of a judicial determination of custody rights. The law of the jurisdiction where the child was habitually resident will determine whether his or her removal violates another party's right of custody, and this law may recognize rights that exist before the issue can be adjudicated. The U.S. State Department analyzed the Convention in this regard and arrived at the following conclusion.

In the United States, as a general proposition both parents have equal rights of custody of their children prior to the issuance of a court order allocating rights between them. If one parent interferes with the other's equal rights by unilaterally removing or retaining the child abroad without consent of the other parent, such interference could constitute wrongful conduct within the meaning of the Convention. Thus, a parent left in the United States after a pre-decree abduction could seek return of a child from a Contracting State abroad pursuant to the Convention. In cases involving children wrongfully brought to or retained in the United States from a Contracting State abroad prior to the entry of a decree, in the absence of an agreement between the parties the question of wrongfulness would be resolved by looking to the law of the child's country of habitual residence.

The third important point is raised by the preceding quote, and it is that the Convention recognizes joint custody rights and may be used to enforce one parent's joint right against the other parent.

As already has been noted, the Convention addresses visitation rights, too. The source of these rights is not mentioned, but as a practical matter one presumably would look to a court decree or an agreement between the parties for a definition of visitation rights. Theoretically, the law of the jurisdiction where the child is habitually resident may create noncustodial parents' access rights in the absence of a decree or agreement, but it is not likely that many countries have laws addressing this question. Thus, the threshold problem in access denial cases is establishing a right of access; once this is done, it should be an easy matter to determine whether the custodial parent has denied this right.

### *What Remedies Are Available?*

The Convention's remedy for a wrongful abduction or retention is to arrange for the child's voluntary return or the issuance of a court or administrative order that directs the child's return to the person or institution entitled to custody. Thus, the purpose behind this treaty is simply to return the child to the status quo ante the abduction or retention; it does not address what court should have jurisdiction over custody matters, or choice of law issues in an international custody dispute, or the merits of a custody dispute, or other remedies such as tort damages for abductions. Also, as the Convention's name makes clear, it only deals with civil aspects of international child abduction; there is no provision for extradition or criminal prosecution of abductors.

Before the Convention can be invoked, the person or institution seeking the child's return must establish several threshold facts, as follows: the requester must be entitled to custody under the law of the child's habitual residence; the requester must have been exercising custody over the child at the time of the removal or retention; and the child's removal or retention must be wrongful under the law of the child's habitual residence.

Assuming these foundational facts are established, Article 12 of the Convention provides that when proceedings for the return of the child are commenced within 1 year of the wrongful removal or retention, the judicial or administrative authority of the Contracting State where the child is located "shall order the return of the child forthwith." If more than 1 year has elapsed, then the judicial or administrative authority "shall...order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

Of course, there are exceptions to the mandatory nature of Article 12. Thus, a court or administrative authority of the Contracting State where the child is located may refuse to order the child's return to the custodian where: the custodian had consented to or subsequently acquiesced in the removal or retention; there is a grave risk that the child's return would subject him or her to physical or psychological harm or otherwise place the child in an intolerable situation; the child objects to being returned and has attained an age and degree of maturity so that it is appropriate to take the child's views into account; or to do so would violate the country's fundamental principles relating to the protection of human rights and fundamental freedoms. Convention, Articles 13 & 20. In deciding how to apply these exceptions, the judicial and administrative authorities "shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." Convention, Article 13.

It is also important to note what is not a defense to a request for an order for the child's return. Specifically, the bare fact that the removing or retaining person has obtained a custody order in the Contracting State where the child is located, or elsewhere, is not in itself a valid reason for refusing to order the child's return. Nonetheless, "the judicial or administrative authorities of the requested state [i.e., the state where the child currently is located] may take account of the reasons for the [custody] decision in applying [the] Convention." Convention, Article 17. It is unclear whether the "reasons for the [custody] decision" can become an independent basis for refusing to order the child's return or whether these reasons must relate to the defenses that are recognized in Articles 13 and 20, noted above, before they can constitute grounds for the refusal.

In addition to actions designed to secure the child's return, the Convention requires Contracting States to assist in locating the child, to undertake cooperative efforts to prevent harm or abuse from befalling the child, and to arrange for the child's safety during his or her return. Technically, however, there is no obligation to actually place the child on an airplane to effect the return. Just how far courts will go to achieve the Convention's purposes will depend on the facts of each case, the legal authority created by local law, the availability of child protective services, and the personalities involved.

There is one final point to be made about remedies for international child abduction. The Convention is not the exclusive means of obtaining a child's return to the person entitled to custody. All American states have enacted the Uniform Child Custody Jurisdiction Act (UCCJA), and it provides for ordering parties to comply with custody orders already in existence. It also permits courts to decline to exercise jurisdiction in child custody disputes where the plaintiff has engaged in reprehensible conduct, which may include unilaterally removing a child from a family home. Under UCCJA section 23, these provisions may be invoked in international cases, and several reported U.S. decisions have in fact applied the UCCJA to international situations. Foreign nations may have similar domestic laws that afford better protection in certain cases than the Convention or which apply in cases where the Convention does not.

### *Invoking the Convention's Protections*

Each Contracting State is required to establish a Central Authority to serve as a point of contact on matters relating to custody and access rights, and the U.S. Central Authority is the State Department's Office of Citizens Consular Affairs. A victim of a wrongful abduction or retention, or of a denial of access, who resides in a Contracting State can request assistance through his own country's Central Authority or he can initiate a direct contact with the Central Authority where the child is located. Theoretically, a person entitled to custody may even be able to bypass both Central Authorities and simply initiate a legal proceeding before a court of the jurisdiction where the child is located. This would be inadvisable, however, since a Central Authority can help in a number of ways, including negotiating the child's voluntary return and obtaining a determination whether the removal or retention is wrongful under the laws of the child's habitual residence.

If a voluntary return cannot be obtained, litigation will ensue. The victim will be entitled to free legal representation in some countries where the child is found, but that will not be the case in the United States. Thus, the person seeking the child's return from a location in the U.S. will have to retain an attorney (the U.S. Central Authority, in conjunction with state and local child welfare officials, will attempt to help in locating suitable counsel).

### *Conclusion*

The U.S. ratification of the Convention should add a significant new enforcement capability for the parent who has been victimized by an international child abduction. The Convention itself and the federal statute which implements it as part of U.S. law are too new, however, to accurately predict how well courts will adhere to the intended purpose of expeditiously returning children to foreign countries.

Additional information about the Convention and the Act can be obtained from the Office of Citizens Consular Affairs, Department of State, Washington, DC 20520, 202-955-0231. Interim regulations for the U.S. Central Authority were published as 22 CFR Part 94 in 53 Fed. Reg. 23608 (1988), and the best compilation of materials on the Convention and the Act is in BNA's Family Law Reporter, Text No. 6, 14 Fam. L. Rptr. 2057. This reference includes the text of the Act, the Convention, the Interim Regulations, and the State Department's Analysis of the Convention.

[rev. 1/24/08]

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