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When Children Cross Borders: *How California Prosecutors Resolve International Child Abduction Cases*

by Elaine F. Tumonis

Interstate vs. International Cases: A Perspective

It is not always easy to enforce a valid California custody order in another state within the United States, even when the laws of both states say that it can be done, even when the states are not separated by barriers of language, culture, or incompatible legal systems. Though each state's laws governing recognition and enforcement of other states' court orders usually work very well, it sometimes happens that investigators travel to another state to recover a parentally abducted child only to be "hometowned," and to return empty-handed. Imagine, then, the difficulties that must be faced when a child is abducted to another country, where very real barriers of language, culture, and legal practice exist.

Until 1988, California prosecutors' ability to pursue international parental abduction cases was limited. State law—specifically, the former Uniform Child Custody Jurisdiction Act (UCCJA)[1]—provided that California would give full faith and credit to other states' court orders, and that California courts would treat foreign countries as if they were states of the United States.[2] These statutes authorized courts in this state to recognize foreign custody and visitation orders in appropriate cases, but did not require reciprocal treatment of any U.S. custody and visitation orders by other countries. So, when an internationally abducted child was found *in* California, district attorneys' offices were sometimes able to handle the matter pursuant to the UCCJA as a natural extension of their existing responsibility to take all actions necessary to locate and recover parentally abducted children located in this state. These laws were of no help in recovering children taken *out* of California and abducted abroad, however; in those cases, prosecutors' ability to recover the children depended on whether they could secure the assistance of law enforcement in the other country or whether legal representation for the left-behind parent could be obtained there.[3] There was no established mechanism or procedure that could be used to retrieve children from another country, and few parentally abducted children who crossed international borders were ever returned.

That changed in 1988, when the United States ratified the Hague Convention on the Civil Aspects of International Child Abduction, a multilateral treaty aimed at resolving the problem of international parental kidnapping.[4] At that time, only nine countries (known as "Contracting States") were parties to it.[5] Now, 24 years after ratification, almost 90 countries are Contracting States, and, as of this writing, it is in effect between the United States and 69 other countries.[6] The ratification and implementation of this treaty has provided local prosecutors with a practical new tool to add to their arsenal of possible remedies in international cases.

How District Attorneys Got Involved in International Law

The incorporation of the Hague remedy into the district attorneys' "bag of tricks" for resolving international parental kidnapping cases began shortly after the United States ratified the treaty and designated the United States Department of State as the Central Authority for implementing and enforcing the treaty.[7] In its capacity as the United States Central Authority, the United States Department of State directed the Governor of California to designate a state agency with responsibility for discharging, within California, the state's duties under the Hague Convention.[8] The Governor, in turn, designated the state Attorney General with that responsibility. The Attorney General, as the chief law officer for the state (and pursuant to the California Constitution, Article 5, section 13, and Government Code section 12550), looked to the county district attorneys' offices to assist in locating and returning parentally kidnapped children pursuant to the treaty, as this work was consistent with district attorneys' obligation under Family Code sections 3130 and 3131 to "take all actions necessary" to locate and return abducted children.[9] Many district attorneys' offices already had established child abduction units, staffed by personnel trained and designated with responsibility for handling parental kidnapping cases. Deputies within the Attorney General's Office worked with local district attorneys' child abduction units to develop procedures for handling these Hague Convention cases. As a result, California has developed a relatively streamlined system for handling what amounts to approximately 20 percent of the "incoming" Hague cases (i.e., Hague cases involving children abducted from other countries to California) received in the United States.[10]

In January 2000, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) went into effect in California. It maintained the "full faith and credit" provisions of the UCCJA, but also added—for the first time—provisions that recognized the role of the state's 58 district attorneys in locating and recovering abducted children pursuant to the Hague Convention.[11] Specifically, the UCCJEA expressly acknowledged that district attorneys were authorized to proceed, in cases involving the Hague Convention, pursuant to Family Code sections 3130 et seq.[12]

It further required that, at a district attorney's request, law enforcement officers "take any action necessary to locate a child or a party and assist the district attorney" with Hague Convention responsibilities.[13] Thus, the handling of Hague Convention cases was formally recognized and codified, for the first time, as part of California district attorneys' overall responsibilities in child abduction cases. In reality, though, the new statute merely confirmed what was already being done in practice.

Basic Provisions of the Treaty

The Hague Convention is a multilateral treaty with three primary objectives:

- to secure the prompt return of a wrongfully removed or retained child to his or her country of habitual residence;

- to ensure that rights of custody and access in one signatory country are respected in other signatory countries; and
- to deter future international abductions.

Aimed at restoring the factual status quo that existed immediately before the child was abducted, this treaty is designed to provide an expeditious procedure for returning a child to his or her country of habitual residence when the child has been "wrongfully removed" from that country and taken to, or is being wrongfully retained in, another country. The basic law governing operation of this treaty is found in the treaty itself and in its implementing legislation.[14] More detailed information about the provisions of the treaty and its interpretation can be found in Chapter IX of the *Attorney General Child Abduction Reference Manual* (see "Resources," below). A short summary of the treaty's main provisions, accompanied by citations to the relevant article of the treaty and/or the implementing legislation, is set forth below.

The Hague Convention is an available remedy when the following criteria are met:

- The child in question is **under the age of 16**. (Art. 4.)
- The **Convention is in effect between both countries**—the one where the child was habitually residing at the time of the wrongful removal or retention, and the one to which the child was taken or retained. (Art. 4.)
- The child has been **wrongfully removed** from, or is being **wrongfully retained** away from, his or her habitual residence. A wrongful removal or retention is defined as one that 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 residing immediately before the removal or retention. The applicant has the burden of establishing, by a **preponderance of the evidence**, that the child has been wrongfully removed or retained within the meaning of the Convention. (Arts. 3, 5; 42 U.S.C. § 11603(e)(1)(A).)
- At the time of the removal or retention, those **custody rights were actually exercised**, or would have been, but for the removal or retention. Custody rights may be established either by court order or by operation of law; there is **no** requirement that a parent have obtained a custody order in order to proceed with a Hague application. (Art. 3.)
- The Convention also applies to aid an applicant parent in organizing or securing the effective exercise of his or her rights of access to a child when those access rights have been breached. (Arts. 4, 5, 21.)

If the foregoing criteria have been met and **less than one year has elapsed** between the time of the wrongful removal or retention and the time a Hague proceeding has been filed in court, then **there is a treaty obligation to return the child forthwith**. (Article 12.) There are a few limited exceptions to this obligation, and they are to be narrowly construed so as not to undermine the effectiveness of the treaty. Even if the existence of any of these defenses has been established by the requisite standard of proof, it only means that there is **no treaty obligation** to return the child; however, the court nevertheless retains **discretion** to return the child in appropriate circumstances.

There is no treaty obligation to return a child if:

- Return proceedings are commenced (by filing a Hague action in court) one year or more after the alleged removal or retention, and it is demonstrated by a preponderance of the evidence that the child is settled in his or her new environment. (Art. 12; 42 U.S.C. § 11603(e)(2)(b).)
- The person opposing return of the child establishes, by a preponderance of the evidence, that the person seeking the child's return was not actually exercising his or her custody rights at the time of the removal or retention, or had consented to or acquiesced in the removal or retention. (Art. 13(a); 42 U.S.C. § 11603(e)(2)(B).)
- The person opposing return establishes, by clear and convincing evidence, that there is a grave risk that return of the child would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation. (Art. 13(b); 42 U.S.C. § 11603(2)(A).)
- The person opposing return establishes, by a preponderance of the evidence, that the child objects to being returned and has attained an age and degree of maturity such that it is appropriate to take the child's views into account. (Art. 13; 42 U.S.C. § 11603(e)(2)(B).)
- The return of the child would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms. (Art. 20.)

How an "Incoming" Hague Case Reaches the District Attorney

"Incoming" Hague Convention cases are those in which a child has been wrongfully removed or retained from another Contracting State and is believed to be located in this country. An incoming Hague application for the return of a child must navigate a complex route of bureaucratic agencies before it reaches the local prosecutor's office in California, where trained personnel will search for and, hopefully, locate and recover the child in question. Under current practice, a foreign Central Authority sends Hague applications to the United States Department of State's Office of Children's Issues ("OCI") when it is believed that a child has been abducted from another signatory country to the United States. When the abducted child is thought to be located in California, OCI, in turn, sends the application to the California Attorney General's Office, where an attorney in the Attorney General's Child Abduction Unit reviews the application, requests any missing information, and routes the application to the district attorney child abduction unit in the county where the child is believed to be located.[15] Thereafter, the Attorney General's Office monitors the progress of the case, provides information and assistance to the local prosecutors as needed, and often serves as liaison among the multiple agencies that may be involved in these cases.

The Role of the District Attorney

Once the local prosecutor's office receives a Hague application, an experienced child abduction investigator and/or deputy district attorney reviews the documentation

provided by the other country, investigates the case, and attempts to locate the child. The investigation should be much the same as if the child were abducted from another state and should include an interview with the victim parent, though time and language differences may make it difficult for an investigator to communicate with the left-behind parent in the other country. The case officers in the U.S. Department of State's OCI can be of great help in communicating with the foreign Central Authority to obtain information from the left-behind parent. If the child is found, and assuming the investigation has confirmed the factual basis for proceeding with the request to return the child to the other country, the investigator and deputy district attorney arrange to recover the child and prepare the case for court, unless it appears that the case can be voluntarily resolved.

District attorneys' offices have a range of options available to them to resolve these cases, depending on the circumstances of the particular case. Through the intervention of district attorney personnel, a case may be resolved voluntarily and informally. In fact, Article 7(c) of the treaty specifically encourages voluntary returns. Taking/retaining parents sometimes agree to return their children to the habitual residence country once they learn that the authorities in the haven country plan to take action against them if they do not. In an appropriate case, the persuasive power of a polite inquiry from a district attorney investigator is not to be underestimated.

As in any parental kidnapping case, investigators must assess the risk that the parent and child will flee if they learn that they have been discovered. If there is no risk of flight, the district attorney's office may serve the parent with notice and a petition for the return of the child, and the matter will be heard at a scheduled hearing. If the taking/retaining parent is a flight risk, the district attorney's office may obtain a protective-custody warrant authorizing them to pick up the child and either bring the child directly to court, or place the child in protective custody—or in some suitable alternative placement—pending a determination whether the child will be returned to his or her habitual residence pursuant to the Convention.

Depending on the circumstances involved and their personal preferences, the parents in a Hague case may be represented by private counsel who will attend any court hearings, along with the district attorney. The treaty does not require that a left-behind parent attend the Hague hearing, and in some counties, prosecutors successfully conduct Hague proceedings without requiring that the applicant parent be present. But many judges are reluctant to order a child returned to another country if the left-behind parent has failed to make the effort to appear at the hearing.

At the court hearing, the deputy district attorney appears pursuant to Family Code sections 3130 et seq. and 3455. He or she does not, of course, represent either parent in the proceeding, but rather acts on behalf of the court, as specified by statute.[16] In preparing the case for presentation in court, and when appearing at the court hearings, the prosecutor's most important function will usually be to educate the judge about what the Hague Convention is, and—perhaps more important—what it is not: **it is not a custody hearing**.

The principal aim of the treaty—to return a parentally kidnapped child to his or her country of habitual residence, where custody and visitation issues can and should be resolved—must not be undermined by the inappropriate consideration of the child's best interests. As explained by Superior Court Judge James D. Garbolino in his book about the Hague Convention:

> While the best interest of the children is the global consideration when determining an award of custody in most U.S. jurisdictions, the Convention specifically prohibits courts from engaging in custody determinations until such time as there has been a determination that the child will not be returned, or the time for lodging an application has passed. Most courts that have dealt with Convention cases have explicitly recognized the limitations placed on their consideration of the child's best interests as a factor to be weighed in determining the question of return of the child.[17]

Nevertheless, perhaps because family courts handling Hague Convention proceedings are accustomed to applying a best-interests test to resolve custody proceedings, or perhaps because of the very human impulse to want to do what is best for a child, judges sometimes incorporate into their rulings in Hague Convention cases a finding that their determination is in the best interests of the child. The prosecutor's most difficult task in these proceedings may well be to persuade the judge that the best-interests test does not apply in Hague Convention cases.[18]

Outgoing Cases

Incoming Hague Convention cases require that the district attorney's office play an active role in investigating, locating, and recovering the abducted child. When a child is abducted *from* California to another Contracting State, the other country bears responsibility for the actual investigation and for conducting the Hague proceedings. However, district attorneys' offices still have an important role to play in these cases. Child abduction personnel in district attorneys' offices assist left-behind parents in obtaining information about the Hague Convention application process and help with preparation of the outgoing applications, which are routed directly to the U.S. State Department and transmitted, in turn, to the appropriate foreign Central Authorities. They also help the applicant-parent monitor the progress of the case in the haven country, collect and provide additional information and documentation to support the request, and assist with arrangements for the return of the children. Though it occurs rarely, they may even travel abroad to recover children and return them to California.

In the Los Angeles County District Attorney's Office, for example, paralegal Beverly Jones has been designated with responsibility for assisting parents with outgoing Hague applications. Her role in these cases is well illustrated by a recent case involving a child wrongfully removed to Australia; Jones was instrumental in securing the child's return. The unusual case involved a couple who were married and had a young child. They decided to relocate to Australia where the father had family and, in order to simplify the

immigration process, they agreed to obtain a divorce in California and to have the father and child travel to Australia first, with mother soon to follow. But once the father and child arrived in Australia, the father refused to have any contact with the mother and eventually told her that he no longer wanted her to join them and that their child was going to stay with him. The mother sought Jones's assistance in initiating a request to return her child to California pursuant to the Hague Convention.

With Jones's assistance, mother filed an application explaining the circumstances under which her child was being retained in Australia without her consent. Jones worked with the U.S. Department of State to respond to a request from the Australian authorities for evidence to support mother's version of the events that led to the child being taken to Australia. Jones helped the mother collect declarations from witnesses and other documentary evidence to support her claims that her ex-husband had duped her into taking their child abroad. The Hague proceedings in Australia culminated with the child being ordered returned to California. Jones assisted the mother in securing financial aid so that she could travel to Australia to recover her child and even helped arrange for counseling for the mother and child to assist them with their reunification after an 11-month separation.

Cases To and From Mexico

Because of California's proximity to Mexico, a substantial number of California's incoming Hague Convention cases originate from Mexico. Similarly, a large number of the state's outgoing Hague Convention applications involve children who are abducted to Mexico. The California Attorney General's Office has a Foreign Prosecution & Law Enforcement Unit ("FPLEU") staffed by investigators who are knowledgeable about the requirements investigators must meet if they plan to cross the border into Mexico to recover a child and who are available to assist district attorney personnel dealing with these cases. District attorney investigators in several counties have been accompanied by FPLEU investigators when they have traveled to Mexico to recover children.

The state Attorney General's Office has made considerable efforts to improve communication between judges, child-protection officials, and prosecutors on both sides of the border who are involved in handling Hague Convention cases. These efforts have resulted in the inclusion of sessions on international parental kidnapping at the Border Attorneys General Conferences, where Attorneys General from states on both sides of the United States-Mexico border meet with prosecutors and law enforcement officials to discuss issues of mutual interest. A joint effort by the San Diego County District Attorney's Office, the state Attorney General's Office, and the Mexican Consulate in San Diego has resulted in a series of annual one-day Binational Child Abduction Conferences. These conferences have allowed participants from both California and Mexico to develop a better understanding of how Hague Convention cases are handled in each country and improve communication and procedures for more effectively handling these cases.

Resources

There are some readily available resources to aid prosecutors in handling a Hague Convention proceeding:

- The *Attorney General Child Abduction Reference Manual*, available online (after logging in) at *http://legalnet.doj.ca.gov,* contains an entire chapter on the subject, in addition to sample pleadings and some case law summaries.
- Judge Garbolino's book about the Convention, cited above and at endnote 17, is written for judges and is a valuable resource.
- The United States Department of State's website, at *www.travel.state.gov,* is another excellent source of information. The website contains an updated list of the United States' treaty partners under the Hague Convention, resources and publications for left-behind parents, attorneys and judges, information about passport issuance and prevention tools, and much more. The U.S. Department of State's OCI Prevention Unit can be contacted at 1-888-407-4747 or PreventAbduction@state.gov for assistance with an international abduction-in-progress.
- The National Center for Missing & Exploited Children ("NCMEC") has resources for attorneys and left-behind parents; their website can be accessed at *www.missingkids.com.*

Sometimes, though, there is no substitute for networking with fellow prosecutors around the state. Each Attorney General's Office has a deputy attorney general assigned to child abduction who can provide information about handling Hague Convention cases, and who can put a prosecutor new to the Hague Convention in touch with experienced prosecutors in other counties.

Conclusion

The Hague Convention has changed the landscape in California—and in the United States as a whole—with regard to how international child abduction cases are handled. In 49 states, private attorneys must be found on an ad hoc basis to assist applicant parents in pursuing their Hague Convention remedies. Only the State of California utilizes public agencies to assist in these cases, as an extension of local prosecutors' existing responsibilities to recover parentally kidnapped children.[19] For parents whose children have been stolen across borders, across oceans, across continents, this assistance is invaluable. California's system for dealing with these cases has been recognized internationally as a model for the rest of the country.[20] While the system (and indeed the treaty itself) may not be perfect,[21] the Convention nevertheless provides a useful and practical mechanism for resolving cases of parentally kidnapped children. It is hoped that, despite the state's current budgetary challenges, California will be able to maintain its renowned child abduction program, and that, over time, other states will develop similar systems for dealing with both interstate and international cases, with a view to reducing the incidence of parental kidnapping.

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ENDNOTES

1. Former Family Code §§ 3400-3425. The UCCJA was the predecessor to the current Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is codified at Family Code §§ 3400-3465.

2. Former Family Code §§ 3413, 3424.

3. California prosecutors have long had authority to hire a private attorney in a foreign country in order to obtain the return of an abducted child. (*See* Family Code §§ 3130 et seq. [former Civil Code §§ 4604 et seq.; *Davis v. Davis* (1985) 173 Cal.App.3d 97; 62 Ops. Calif. Atty. Gen. 369 (1979) (costs of hiring foreign counsel to enforce California custody decree in civil action in Canada were reimbursable to district attorney)].)

4. There are numerous Hague Conventions on a variety of topics, but for purposes of this article, the Convention dealing with international child abduction will be referred to as simply "the Convention."

5. Deborah M. Huynh, Note, *Croll v. Croll: Can Rights of Access Ever Merit a Remedy of Return Under the Hague Abduction Convention?*, 26 N.C.J. Int'l Law & Com. Reg. 529, 530 (Spring 2001).

6. Adair Dyer, *Keynote Address: To Celebrate a Score of Years!*, 33 N.Y.U.J. Int'l L. & Pol. 1, 7 (Fall 2000); for a list of countries as to whom the Hague Convention is in force, see the Internet sites maintained by the Hague Conference at *www.hcch.net* and by the U.S. State Department at *www.travel.state.gov*.

7. Article 6 of the Hague Convention requires each Contracting State or signatory to the treaty to designate an agency to serve as the Central Authority for the treaty in that country. In the United States, the State Department's Office of Children's Issues fulfills that function. The State Department processes both incoming Hague applications (which seek the return of children from the United States to another signatory country) and outgoing applications (which request the return of abducted children from another signatory country to the United States), and sets policy with regard to the Convention. It also processes incoming and outgoing access applications filed under the Convention.

8. 42 U.S.C. § 11606(a); Exec. Order No. 12648; 53 Fed. Reg. 30637 (1988).

9. This process of designation is reflected in correspondence from former United States Secretary of State George Shultz to former Governor George Deukmejian, from Governor Deukmejian to the United States Department of State, and from former Attorney General John Van de Kamp to all District Attorneys. *See also* Cal. Const. Art. 5, § 13; Gov. Code § 12550.

10. This figure is an approximation based on information received from NCMEC and the State Department as well as the Attorney General's Office's own records.

11. Family Code §§ 3405, 3453.

12.Family Code § 3455.

13. Family Code § 3456.

14. The treaty can be found at 51 Fed. Reg. 10498 (March 26, 1986). The implementing legislation is found at 42 U.S.C. §§ 11601 et seq.

15. If a child is located in a county covered by the Los Angeles branch of the Attorney General's Office, the Hague application is sent directly to that county. If the child is located in another county, the case is sent to the child abduction coordinator (a deputy attorney general) in the appropriate Attorney General's Office for forwarding to the county. The California Attorney General's Office has offices in Sacramento, San Francisco, San Diego, and Los Angeles, each of which covers a geographic area coextensive with the boundaries of the appellate court districts.

16. Family Code § 3455(b).

17. Hon. James D. Garbolino, *International Child Custody Cases: Handling Hague Convention Cases in U.S. Courts* (3rd ed., National Judicial College 2000), p. 18 (fns. omitted).

18. For this reason, some private practitioners prefer to present their cases in federal court, on the theory that federal judges are more apt to apply the strict terms of the treaty and less apt to handle a Hague case as if it were a family-law matter. There are, however, other advantages to presenting these cases in state court. For instance, local prosecutors are more accustomed to appearing in state court and are more familiar with the practices and procedures in their local jurisdiction. Especially in small counties, they may have a well-established working relationship with the family court staff, and consequently the local judge may be more comfortable with the prosecutor's appearance on behalf of the court in these actions. (*See* Family Code § 3455(b).) Both state and federal courts have jurisdiction to hear Hague cases (42 U.S.C. § 11603(a)), and the choice of forum in which to commence a proceeding should be carefully weighed.

19. California's leading role in the implementation of the Hague Convention was recognized by the inclusion of representatives from the state as members of the United States delegation to the Fourth Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, held in The Hague in March 2001.

20. *See*, e.g., Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. Int'l L. & Pol. 221, 249 (Fall 2000); Dyer, *supra,* 33 N.Y.U.J. Int'l. L. & Pol. at 2 (acknowledging that the assistance of state authorities in Hague cases in California has alleviated, to some extent, the difficulties resulting from the lack of legal aid for applicants).

21. *See*, e.g., Silberman, *supra*, 33 N.Y.U. Int'l L. & Pol. at 222; William Duncan, *A View From the Permanent Bureau*, 33 N.Y.U. Int'l L. & Pol. 103-104, 122-123 (Fall 2000). Duncan discusses charges often leveled at the Convention, which include: (1) lack of speed and rigor in applying the Convention and the overuse of defenses, (2) concern that the Convention may be too drastic a remedy for some situations, (3) the insufficiency of the treaty's provisions regarding visitation, access, and contact, and (4) in light of the treaty's globalization, concern that acceding states may not be adequately prepared and equipped to fulfill their treaty obligations. He describes steps being taken to address these concerns and to encourage the development, internationally, of best practices in implementing the Convention. He further notes that despite the "stresses and strains to which the Convention is subject," one must consider, in evaluating the treaty's effectiveness, whether the predicament of abducted children would be better or worse without it.