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When the Question Involves an International Move

The answer may lie in retaining U.S. jurisdiction

By Lawrence Katz

Due to the ease and reduced cost of international travel, as well as the speed of modern communications, the world has become smaller. More cross-cultural relationships are developing than ever before, as are more international marriages among people of all socioeconomic levels. A significant percentage of those marriages will terminate in divorce and may result in increased child abductions and international child-custody litigation.

The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct. 1980 (Hague Convention) is an international treaty that was promulgated in response to the global problem of international child abduction. The Hague Convention was adopted 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 nation-state of their habitual residence, as well as to secure protection for rights of access. Its purpose is to deter international child abduction and to provide a mechanism for the prompt return of abducted children to their home countries where the courts can resolve the custody issue on its merits.

The Hague Convention applies only among contracting states and is available only when a child is wrongfully removed from a signatory country and retained in another signatory country. The United States ratified the Hague Convention in 1988, and the Convention was implemented by the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 et seq. (2000).

ICARA deals primarily with the procedural and jurisdictional aspects of proceedings for the return of children from the United States to other signatory countries. A petitioner cannot invoke the protection of the Hague Convention unless the child to whom the petition relates is “habitually resident” in a nation-state signatory to the Hague Convention and has been removed to or retained in a different nation-state. The petitioner must then show that the removal or retention is “wrongful” (see Article 3). Limited defenses are available under the Hague Convention (see Article 12, 13, and 20).

Defining “habitual residence” has not been easy for the courts. No consensus has been reached, although almost all circuits have considered cases involving its definition. See *Gitter v Gitter*, 396 F.3d 124 (2d Cir.); *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995); *Miller v Miller*, 240 F.3d 392, (4th Cir. 2001); *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993); *Silverman v. Silverman*, 338 F.3d 886,

898 (8th Cir. 2003); *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001); *Ruiz v Tenorio*, 392 F.3d 1247 (11th Cir. 2004).

Abduction factors

Several states, including Arkansas, California, and Texas, have promulgated statutes designed to deal with issues that may arise in international travel and custody matters. These statutes usually require courts making a custody determination to consider a list of abduction factors, one of which is whether the other country is a signatory to the Hague Convention.

Texas provides that if the court finds it necessary under § 153.501 to take measures to protect a child from international abduction by a parent, the court may take any of several listed actions, but the code does not define “risk factors.” Tex. Fam. Code § 153.503 “Abduction Prevention Measures.”

The Arkansas Statute Ann. § 9-13-406 authorizes the court to order abduction-prevention measures, but does not list “risk factors.” However, subdivision (c) provides that “The court shall consider the requests of the parent or custodian who does not pose a risk of international child abduction when determining the best methods to prevent the international abduction of a child at risk of becoming a victim of international child abduction.”

Florida promulgated Florida Statute § 61.45(3), which provides that in assessing the need for a bond or other security, the court may consider “any reasonable factor bearing upon the risk that a party may violate a visitation or custody order by removing a child from this state or country or by concealing the whereabouts of a child. The factors that may be considered include, but are not limited to, whether a court had previously found that a party removed a child from Florida or another state in violation of a custody or visitation order; whether a court had found that a party had threatened to take a child out of Florida or another state in violation of a custody or visitation order; whether the party has strong family and community ties to Florida or to other states or countries, including whether the party or child is a citizen of another country; whether the party has strong financial reasons to remain in Florida or to relocate to another state or country; whether the party has engaged in activities that suggest plans to leave Florida, such as quitting employment; selling a residence or terminating a lease on a residence without efforts to acquire an alternative residence in the state, closing bank accounts or otherwise liquidating assets, or applying for a passport; whether either party has had a history of domestic violence, as a victim or perpetrator, a history of child abuse or neglect as evidenced by criminal history, including but not limited to, arrest, an injunction for protection against domestic violence issued after notice and hearing, medical records, affidavits, or any other relevant information; or whether the party has a criminal record.

Asimilar statute has been enacted in California. California Family Code § 3048 (b)(1) contains the following factors that a court may consider in determining whether there is a risk of abduction: whether a party has previously taken, enticed away, kept, withheld, or concealed a child in violation of the right of custody or of visitation of a person; whether a party has previously threatened to take, entice away, keep, withhold, or conceal a child in violation of the right of custody or of visitation of a person; whether a party lacks strong ties to the state; whether a party has strong familial, emotional, or cultural ties to another state or country, including foreign citizenship, which is considered only if evidence exists in support of another factor specified in the section; whether a party has no financial reason to stay in the state,

including whether the party is unemployed, is able to work anywhere, or is financially independent; whether a party has engaged in planning activities that would facilitate the removal of a child from the state, including quitting a job, selling a primary residence, terminating a lease, closing a bank account, liquidating other assets, hiding or destroying documents, applying for a passport, applying for a birth certificate or school or medical records, or purchasing airplane or other travel tickets, with consideration given to whether a party is carrying out a safety plan to flee from domestic violence; whether a party has a history of a lack of parental cooperation or child abuse, or there is substantiated evidence that a party has perpetrated domestic violence; and whether a party has a criminal record.

In the event that the state in which an international relocation matter is pending has not promulgated a similar statute containing abduction factors, counsel may consider citing the foregoing as relevant factors for the court to consider.

The Hague Convention, however, does not protect ongoing access between the left-behind parent or guardian and the child who has relocated to a foreign country. Although Article 21 of the Hague Convention provides for access, no corresponding enforcement provisions are included for rights of custody. The federal courts have held that they do not have jurisdiction with respect to access issues. See *Wiesel v. Wiesel-Tyrnauer*, 388 F. Supp. 2d 206 (S.D. N.Y. 2005). Thus, there is no assurance that access orders will be recognized and enforced after relocation takes place. Consequently, some courts have denied a custodial parent's request to relocate to a foreign country given that access by the left-behind parent would be reduced and difficult to enforce.

Subject-matter jurisdiction

An attorney who is presented with an international relocation matter must initially be familiar with that state's current law relative to custody awards and relocation and then whether the nation-state where the party intends to relocate is a signatory to the Hague Convention. The initial determination also should include whether the court that entered the final judgment has continuing subject-matter jurisdiction over the relocation. See *Bartolotta v. Bartolotta*, 703 So. 2d 1229 (Fla. 4th DCA 1998).

In a pre-Hague Convention case, the Georgia Supreme Court, in *Mitchell v. Mitchell*, 252 Ga. 46, 311 S.E.2d 456 (1984), affirmed the lower court's order denying the mother's relocation to the United Arab Emirates on the basis that the non-Muslim father would not have rights of access to courts there and, therefore, would be unable to enforce his visitation/access rights in that country.

Nor was relocation authorized in two pre-Hague Convention New York cases. In *Daghir v. Daghir*, 82 A.D.2d 191, 441 N.Y.S. 2d 494 (1981), the mother, who remarried, was denied the right to relocate to France so that her new spouse could accept an assignment. It was significant to the appellate court that the relocation was not required by a "truly compelling factor" in that her new spouse's career would not benefit from the move; there was no financial advantage; he would lose nothing if he rejected the assignment; and the mother married her new spouse after he accepted the offer knowing full well it would necessitate her relocation to France, albeit she never discussed it with the children's father in advance. The lower court's decision unreasonably interfered with the father's right to meaningful visitation and was contrary to the children's best interests.

In *O'Shea v. Brennan*, 88 Misc. 2d 233, 387 N.Y.S. 2d 212 (Sup. Ct. 1976),

relocation to Australia was not permitted where the New York Supreme Court found that the proposed move was not in the best interest of the child because once the infant was removed to Australia, the court would lose jurisdiction over her and would render the father's rights of visitation illusory. See also *Otavo v. Otavo*, 374 N.W. 2d 509 (Minn. App. 1985), where the trial court's order was affirmed denying permission to relocate to Finland for

virtually the same reasoning as in *Daghir*. A relocation was also not authorized in *Ex parte Dame*, 121 N.Y.S. 2d 168, *aff'd*, 122 N.Y.S. 2d 896 (Sup. Ct. 1953) (relocation to England), and *In re Marriage of Meier*, 286 Or. 437, 595 P.2d 474 (1979) (change of residence to Canada would severely limit visitation rights).

Foreign enforcement

In considering whether to authorize relocation since the ratification of the Hague Convention, courts will look to what extent the foreign country would enforce the left-behind parent's visitation or access rights. A review of recent case law among state courts that have ruled on a request for international relocation indicates that the very fact as to whether the party desires to relocate to a signatory country to the Hague Convention, as opposed to one that is not, is of primary importance in its determination.

In some Middle Eastern countries, a left-behind parent may be prevented from obtaining a visa to enter that country without the prior written authorization from its citizen residing there. The foregoing presents a classic example of the importance of ascertaining whether a country has ratified or acceded to the Hague Convention, regardless of the party being represented in the international relocation matter. This lack of access to the courts of that country, even if it is a Hague Convention signatory, is an important factor in relocation cases.

In the final analysis, courts either take a best-interest approach, putting the best interest of the child ahead of all else, including the right of the left-behind parent to access, or place primary importance on the right of the child to have regular and frequent visitation with the parent who may be left behind if the right to relocate is granted.

In the case of *In re Marriage of Condon*, 62 Cal. App. 4th 533, 73 Cal. Rptr. 2d 33 (1998), the California Second District Court of Appeal affirmed a lower-court order by which the wife was permitted to relocate with the parties' minor children to Australia with the husband receiving

liberal rights of visitation (access), provided that she consent to an order conceding the continuing jurisdiction of the California courts, and the trial court was required to impose appropriate sanctions to enforce her concessions.

Three problems

The court found that there were three concerns that generate "best interest" problems, which make foreign relocations different in kind from intrastate and even most interstate relocations. There is a cultural problem, a distance problem, and the jurisdictional problem. It pointed out that California court orders governing child custody lack any enforceability in many foreign jurisdictions and lack guaranteed enforceability even in those that subscribe to the Hague Convention. Thus, California courts cannot guarantee that custody and visitation arrangements they

order for the nonmoving parent will be honored.

In its view, a trial court confronted with a parent's request to relocate a child to a foreign jurisdiction must consider all three of the above factors, in addition to those affecting a domestic move-away. Before permitting any relocation that purports to maintain custody and visitation rights in the nonmoving parent, the trial court should take steps to ensure its orders to that effect will remain enforceable throughout the minority of the affected children.

The relocation to a foreign nation-state may cause the shifting of the habitual residence of the child and, therefore, the Hague Convention may not apply; thus, a petition seeking the return of the child would be denied. In following Condon, the court of appeals in *Lasich v. Lasich*, 99 Cal. App. 4th 702, 121 Cal. Rptr. 2d 356 (2002), was concerned, in part, about that issue. Therefore, in an attempt to avoid the shifting of the habitual residence, the mother was required to register the order in Spain under the Hague Convention, at least annually, and to provide proof to the father prior to the relocation.

The relocation order provided that since the children's residence was in California for more than ten weeks per year that they were still habitual residents of that state and not Spain. The mother was required to make such a declaration, acknowledging it in the Spanish courts on an annual basis and providing proof to the father. She also was required to post a bond, which was forfeitable if she sought to modify the court order.

A trial court's order permitting the postjudgment relocation of a child to Israel was affirmed in *Tamari v. Turko-Tamar*, 599 So. 2d 680 (Fla. 3rd DCA 1992). This case was decided prior to enactment of the relocation statute set forth in Florida Statute § 61.13 and the recently enacted Florida Statute § 61.45.

I am not suggesting that the result would not have been different in *Tamari* in light of the change in the law. The mother sought to relocate to Israel and offered to pay the difference in the airfare for the father who resided in New York. The mother's family had relocated to Israel, and no other family members remained in Miami. The court held that the move would be allowed because she would have family support there and the father's contact would not be affected substantially by the relocation.

Significantly, under the Uniform Child Custody Jurisdiction and Enforcement Act, the State of Florida would no longer have continuing subject-matter jurisdiction over its decree under these facts, given the lack of significant contact by either party to that state. Therefore, any effort by the father to enforce his rights may have been problematic. See *Yurgel v. Yurgel*, 572 So. 2d 1327 (Fla. 1990).

In *Osmanagic v. Osmanagic*, 2005 Vt. 37, 872 A.2d 897, 899 (2005), the Vermont Supreme Court stated that "we decline father's invitation to graft the Condon factors onto the statute" since it was an international relocation. *Id.* at 899. The parties, both Bosnian citizens, were married in Bosnia, and their son was born there in 1997. Seeking to escape the war in their home country, the family moved to Vermont in 1999. In November 2002, the parties separated, and mother filed for divorce.

During the proceedings, Ms. Osmanagic sought permission to return to Bosnia. The family court engaged in a "best interest" analysis and held that it was in the best interest of the child to be with his mother. That determination was upheld by the Vermont Supreme Court based on the "best interest" analysis. The Hague

Convention was not mentioned in the decision.

The following cases, all decided before ratification of the Hague Convention, authorized the relocation of a child or children to a foreign country: *Byers v. Byers*, 370 S.W.2d 193 (Ky. 1963), removal to South Africa was in the best interests of the two girls who were approaching adolescence since they needed the mother's special care and a reasonably alternative visitation (access) schedule was made for the father; *Santucci v. Santucci*, 221 N.J. Super. 525, 535 A.2d 32 (1987), removal to El Salvador, where mother had remarried, the children would have full-time care, and the father's rights were protected by an alternative visitation schedule; *In re Marriage of Ditto*, 52 Or. App. 609, 628 P.2d 777 (1981), the mother was permitted to remove the children to New Zealand with her new husband who accepted a job there, and alternative visitation arrangements had been made for the left-behind father; *Bozzi v. Bozzi*, 177 Conn. 232, 413 A.2d 834 (1979), the mother was permitted to remove the child to Holland, where there was no provision in the custody decree prohibiting relocation.

Best-interest analysis

A lower New York court in *Lazarevic v. Fogelquist*, 175 Misc. 2d 343, 668 N.Y.S. 2d 320 (Sup. Ct. 1997), permitted the mother's relocation to Saudi Arabia, a non-Hague Convention country, provided she complied with the conditions it set. The supreme court undertook a "best interests" analysis and reasoned that there was a large disparity in the respective incomes of the parties, that there were good schools in Saudi Arabia, as well as antiterrorism programs that had been implemented, and the child would be living with his half-siblings and stepfather.

The former wife declared in that case that she would be leaving New York City with her two younger children, the child's stepsiblings, to join the stepfather who had already moved to Dhahran to pursue financially rewarding employment with Aramco. The court held that to deny relocation would result in a dramatic change in that the child's lifelong relationship with his mother, stepfather, and siblings would end. It proclaimed that its decision was in accord with the New York Court of Appeals decision in *Tropea v. Tropea*, 87 N.Y.2d 727, 642 N.Y.S.2d 575, 665 N.E.2d 145 (1996), which replaced New York's previous "exceptional circumstance" test for relocation with a full, general, and detailed inquiry as to what is in the child's best interest.

The fact that Saudi Arabia was not a signatory to the Hague Convention was not a factor considered by the *Lazarevic* court, apparently because counsel never brought it to the court's attention.

In contrast, in *Ahmad v. Naviwala*, 306 A.D.2d 588, 762 N.Y.S.2d 125 (2003), where the Hague Convention was brought to the court's attention, the outcome was different. There the respondent father who worked in Saudi Arabia took the children for a three-month visit in 2000. The mother ultimately was refused all contact with the children and was informed that they would not be returning. Ongoing efforts by petitioner during the next two years to regain custody of the children were severely limited by respondent's subversive measures, cultural barriers, and inaccessibility to the Saudi legal system. In 2002, the children were seized in Texas while visiting with the father's family.

The family court granted custody to the respondent pursuant to the parties' agreement, which provided for the children to live with him after 2002. Recognizing

that Saudi Arabia was not a signatory to the Hague Convention and that there was no method by which petitioner could enforce her visitation rights while the children resided in that country, the family court imposed various conditions upon respondent, including the posting of a bond.

The appellate division reversed that determination, holding that the family court failed to fully appreciate the magnitude of the respondent's actions in abducting the children. Testimony of experts supported the petitioners' contention that the safeguards put in place by the family court to ensure the petitioner's access to the children in Saudi Arabia were wholly insufficient.

One problem often presented is where the custodial parent is in the United States on a work or visitor's visa that will expire or has expired. If that parent remains here without obtaining a change in immigration status, he or she becomes an illegal alien. It is not unusual for a practitioner focusing on international family law matters to be presented with the following scenario.

Both parents entered the United States on work visas; they subsequently divorce with a child or children; the noncustodial parent remarries and obtains a change in immigration status by becoming a residential alien; and the custodial parent, who did not obtain a change in that status, experiences a termination of employment and as a consequence must leave the United States or risk remaining here as an illegal alien.

This problem was addressed by the Supreme Court of Wyoming in *Stonham v. Widiastuti a/k/a Stonham*, 2003 Wyo. 157, 79 P.3d 1188 (2003), when it affirmed a district court judgment that awarded sole custody of the children to a mother, permitted their relocation to Indonesia, and ordered that the father's visitation must take place in that country after he posted a bond of \$50,000, which was required because of his threats to kidnap a child.

Great discretion

The parties were married in Indonesia, and the mother entered the United States with a tourist visa that expired previously, rendering her an illegal alien. As a result of domestic violence, the mother left the marital home and went to a safe house. The father filed for divorce. The Wyoming Supreme Court held that in analyzing other international relocation cases, "there is one common analytical thread in virtually every case: the best interest of the child is paramount in any award of custody and visitation, and the trial court has a large measure of discretion in making that award. Whether one parent is moving with the children across town or across the world, the analysis remains the same."

In *Condon*, the California court addressed the problem of enforcing a custody order in a foreign jurisdiction, such as Australia, noting that apart from the Hague Convention, several statutes in Australia authorize an Australian court to disregard the continuing jurisdiction of a California court to modify its child custody orders. It noted that to avoid this "enforceability conundrum," the mother had offered to concede the continuing jurisdiction of the California court, which may or may not have the effect of changing the child's habitual residence. The court in *Lasich* further attempted to avoid the potential argument that the Hague Convention would not apply to ordering the return of the children to California because after the relocation the habitual residence would shift to Spain.

Nevertheless, the problem that remained in *Condon* and the problem that remains

in all international relocation cases is whether the foreign court, irrespective of its status as a Hague contracting state, will enforce an agreement by the relocating parent allowing jurisdiction to remain in the United States. Absent such an advance

ruling by the foreign court and entry of a mirror order, there is no way to assure that custody jurisdiction will remain here. Thus, other mechanisms may have to be created or found to safeguard enforcement or facilitate relocation to a non-Hague nation, where it is otherwise in the best interests of the children.

Lawrence Katz has practiced law for thirty-seven years. He focuses his Miami, Florida, practice on family law with an emphasis on international and interstate cases. He is a mentor with the International Child Abduction Attorney's Network (ICANN), serves on the International Family Law Committee, and has received awards from the National Center for Missing and Exploited Children.

Sidebar:

Hague States

A list of Hague Convention signatory countries and effective dates with the United States, can be found at http://travel.gov/family/abduction/hague_issues/hague_issues_1487.html#