

**INTERNATIONAL PARENTAL CHILD
ABDUCTION
SPECIALIST INTEREST SEMINAR
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Relevant law

We are concerned with the Children Act 1989, Senior Courts Act (Inherent Jurisdiction of the High Court) The Child Abduction and Custody Act 1985 and The Child Abduction Act 1984.

1. Outgoing abductions

Parental Child Abduction cases will normally come before the English Court under the provisions of either the Children Act 1989 or the Senior Courts Act 1981 (Inherent Jurisdiction/Wardship). These are civil proceedings

The Child Abduction Act 1984 is the criminal statute.

The Child Abduction and Custody Act 1985 is a civil statute that implements inter alia the Hague Convention on the Civil Aspects of International Child Abduction. It primarily deals with incoming cases of children abducted into the UK.

2. Parental Responsibility/Parental Rights/Rights of Custody

Parental Responsibility means all the rights, duties, powers, responsibilities and authorities which by law a parent of a child has in relation to the child in his property.

For the purposes of the law of England and Wales a child is defined as being under the age of 18 years.

That said, majority of powers under the Children Act terminate at the age of 16 years.

Examples include the duty to care for a child, the duty to ensure a child is educated, the right to determine a child's name, the right to be consulted on major issues such as health and in particular the right to decide upon the country in which a child lives.

Where a child is to be removed permanently from the jurisdiction of England and Wales to live in another country, the consent of all those with parental responsibility is required or in the case of disagreement, permission from the Court.

3. Who has Parental Responsibility?

The mother who gave birth to the child always has parental responsibility and always retains it (save for adoption and parental surrogacy orders).

A father of a child who is married to his mother at the time of birth (even if he is in fact is not the biological father) has parental responsibility for that child – a biological father can also acquire it by subsequent marriage.

These provisions now equally apply to civil partners.

Where a mother is unmarried at the time of birth - after 1st December 2003 and where the father is named on the child's UK birth certificate as the father, he will acquire parental responsibility even if not married to the mother.

Other means of acquisition are:-

- (i) Parental Responsibility Agreement. This must be made in a prescribed form and witnessed before a Court official.

All those with parental responsibility must consent to the agreement.

Where an un married father acquires parental responsibility through a parental responsibility agreement (or an order) the birth certificate can be amended.

A parent can apply to the Court under the Children Act – Section 4(1)(C) Children Act 1989 for parental responsibility. Applications will normally be made to Family Proceedings Court or County Court.

4. Parental Responsibility also acquired by the making of a residence order

Where a Court makes a Residence Order in favour of a person that person will acquire Parental Responsibility for the child - S8 The Children Act.

The question of who and does not have parental responsibility will determine whether or not a removal of a child from the jurisdiction of England and Wales is wrongful. A removal to Scotland, Northern Ireland and the Isle of Man is not wrongful unless it is in breach of an order (further it is not a criminal offence whether in breach of an order or not).

Where a person does not have parental responsibility but is a parent (ie. an unmarried father who is not named on the birth certificate) and there is a reasonable belief that the child maybe removed the Court can make a Prohibited Steps Order pending the determination as to whether or not a parental responsibility order should be granted and prohibit the child's removal - S8 Children Act.

A Residence Order means an order settling the arrangements as to the person with whom a child is to live .Shared residence is possible .

Most usually step-parents will acquire parental responsibility through the making of a shared residence order with the child's other parent.

The rules relating to step-parent residence orders apply civil partnerships as well.

Where the Court makes a residence order in favour of any person who is not the parent or guardian of the child concerned, that person shall have parental responsibility for the child whilst the residence order remains in force.

5. Wardship/Inherent Jurisdiction

Wardship is an historic relief and provides a means for the Court acquiring parental rights in respect of a child and which the Court then shares with the parents.

The making of a Wardship order will automatically prohibit the removal of a child from the jurisdiction without permission of a Court. However it is advisable to obtain other Orders to ensure a removal does not occur ie an order taking away the passports.

Removal of a Ward from the jurisdiction without the leave the Court will be a Contempt of Court.

7. Section 13 Children Act

Where a Residence Order is in force no person may cause the child (a) to be named by a different surname; or (b) remove him from the United Kingdom without either the consent of every person who has parental responsibility for the child or leave of the Court.

8. Section 13(2)(1)(b)

Does not prevent the removal of a child for a period of less than one month by the person in whose favour a residence order is made - 28 days

The importance about this provision is that it is clearly designed to allow temporary removals from the jurisdiction for the purposes of holidays etc.

Confusion often arises where a person in whose favour a residence order is made takes a child on holiday and gives an indication that they do not intend to return the child at the end of the holiday.

It is not necessary, in those circumstances to wait for the expiry of the 28 days before taking action.

The intention is to retain the child permanently out of the jurisdiction and so the 28 day permission rule no longer applies.

Various steps can be taken to prevent the removal of a child from the country:-

1. Application under the Children Act for a Prohibited Steps order;

“A prohibited steps order means an order that no step which could be taken by a parent in meeting his parental responsibility for a child ... shall be taken without the consent of the Court.

2. Specific Issue order:-

Means an Order giving directions for the purposes of determining a specific question which has arisen:-

for example that a parent should handover a child's passport for safekeeping by the Court.

The court can order a person to return a child to the jurisdiction.

Where a child is outside of the jurisdiction the proceedings whether in the Children Act or Wardship should be issued in the High Court.

3. Orders in Wardship

The court has all the powers to make orders as set out above. The court can also order the removal of a parent's passport (including a foreign passport).

Once a child is a Ward all major steps in the child's life ie medical treatment require the courts permission.

4. Where a child is missing the court can order various third parties to disclose information ie banks, benefit agencies, travel agents airlines and telephone companies to assist in location.

The court can also order relatives and parents to attend court to be cross examined on oath as to the whereabouts of a child. The court can make orders in contempt of court, in the event of non-compliance by way of committal orders for a fine or imprisonment.:-

Where a Tipstaff's order is made, the Tipstaff can arrest a person who refuses to disclose a child's whereabouts.

PORT ALERTS

Some confusion has arisen about Port Alerts.

When seeking to prevent a child from being removed from the jurisdiction and making for an order directed to the Tipstaff for the collection of a passport (a Location Order) the Court will also make a specific order setting out that there should be a Port Alert.

Where a Tipstaff's Order is made in respect of a child a Port Alert will automatically be put in place.

In other cases a Judge may specifically request that a Port Alert be made.

Confusion often arises to whether that practice within the Civil Courts has removed the general rule and powers of a police constable to put out a Port Alert in respect of a child where there is "a real and imminent danger of a child's removal".

The two are not exclusive and the police power remains in being and a Court order is not required.

Where a parent believes there is a real and imminent danger that a child may be removed and in the absence of any Court orders, they can still request that a police constable to put out a Port Alert.

9. The Child Abduction and Custody Act 1985

This is the Act that imports the provisions of the Hague (child abduction) Convention into English law and relates to the implementation of that Convention.

It procedurally primarily relates to children brought into the UK.

It is unusual for the English Court to make an order under that Act in respect of a child removed from England save for declaratory orders setting out who had rights of custody in respect of a child and declaring a removal/or retention wrongful.

10. The Child Abduction Act 1984 – The Criminal Act

This is the criminal law and makes child abduction a statutory offence. Where a parent illegally removes a child the statutory offence should be relied on rather than the common law of kidnap.

The Act covers both parental and stranger abductions but different sections apply.

Part I of the Act deals with Parental Abductions.

Section 1 – Part I – a person connected with a child under the age of 16 years commits an offence if he takes or sends a child out of the United Kingdom without the appropriate consent.

A person is connected with a child if he is a parent or where the parents are not married he has reason to believe he is the father of the child or he is a guardian of a child or is a person who has a residence order or who has custody of a child.

Appropriate consent means the consent of:-

- (i) The child's mother
- (ii) The child's father if he has parental responsibility for him
- (iii) Any guardian for the child
- (iv) Any person in favour of whom a residence order has been made
- (v) Any person who has custody of a child
- (vi) Or leave of the Court.

There are various defences to the Act. A person does not commit an offence if he takes or sends a child out of the UK if he is a person in whose favour there is a residence order and it is a removal for less than one month (see above).

Section I(5) – He does not commit an offence if he does so in the belief that (a) the other person has consented or would have consented if he was aware of all the relevant circumstances or (b) he has taken all steps to communicate with the other person but is unable to do so or the other person unreasonably refuses to consent.

Prosecutions under the 1984 Act require the consent of the Director of Public Prosecutions before they can proceed.- public policy test.

All the rules as to conspiracy, aiding and abetting apply to the offence ie a relative who assists by buying the tickets

The DPP requirement does not of course prevent a police officer taking reasonable steps to investigate the removal of a child which appears to be contrary to that Section, to investigate a complaint of the same or to apprehend and arrest the person he suspected of making such offence.

The offence carries a maximum of 7 years in prison. It is an extraditable offence.

11. Overlap between the Civil Law and Criminal Law and the assistance of Law Enforcement Agencies

Tipstaff Orders – in the normal course the Tipstaff's order will often be executed through the assistance of the police who will execute the order to remove passports and locate the whereabouts of children and report back to the High Court Tipstaff.

Port Alerts – a Court ordered request for a Port Alert will be transmitted to the police who will then inform the National Ports of the request.

Extradition – many countries especially the United States of America – treat parental child abduction as a felony and frequently a Hague request for the return of a child will be accompanied by a request for extradition of the abductor

The two are exclusive. An extradition order will not deal with the person of the child and will not repatriate the child . Civil procedures will be necessary for the return of the child to be ordered.

In cases where a person who has removed the child to England and Wales is held in custody on an application for an extradition warrant - production orders etc have to be made in order to allow that person to take part in the Hague Convention process.

Where a child has been removed from the jurisdiction of England and Wales and its whereabouts are unknown often the police will under the 1984 Act powers question relatives as to whereabouts however, the police will be unable - in the absence of any co-operation or information to take the matter very much further.

This should be compared with the powers of the High Court under the Inherent Jurisdiction when seeking information as to the whereabouts of the child and checking phone records, bank statements etc and where orders in contempt including imprisonment can be made if a person refuses to give, or provides misleading, information.

Usually practitioners should be in close liaison with the police so that any police questioning before the making of a High Court does not “tip-off” the abductor or the family who then may disappear.

12. Miscellaneous

Wardship Orders remain in being until 18 years.

A Residence Order will cease at 16 years.

A child is between the age of 16 to 18 years can now apply for their own passport. Where a passport has been seized it is always sensible to (a) make enquires as to whether a child is entitled to a passport in respect of another nationality, and if so, ask the Court to make an appropriate request (not an order) that no further passports be issued; and (b) to ensure that a check is carried out with the Passport Agency to ensure that there is not more than one British passport already in existence or a false claim made that it has been lost or destroyed and an application for a new passport is pending and (c) the court can order that no further UK passports be issued.

Wrongful Retention. The 1984 relates to taking or sending a child thus the offence is the removal of a child not a child's retention. When abductions arise out of a holiday and a child is not returned it will depend on the surrounding facts as to whether it was in fact a planned removal. In some cases it is clear that the consent to a holiday was based on a deception and all of the evidence surrounding it would suggest a permanent intention to remove such as - notice to schools, cancellation of child benefit, selling a house, giving up rental property etc. The CPS must decide whether all those acts in fact constitute a 'removal' and thus there was no necessary consent given by the other parent.