

CHILD ABDUCTION : CASE MANAGEMENT IN PRACTICE FOR REUNITE

Miscellaneous practical issues confront practitioners. There are traps for the unwary .

1 THE STATUTORY FRAMEWORK

Supreme Court Act 1981 :

Child Abduction and Custody Act 1985:

(I)Hague Convention on Civil Aspects of International Child Abduction 1980

(II) European Convention 1980 is effectively superseded by the new updated regulation known as Brussels II Revised EC2201/2203, Denmark has not opted in.

Family Law Act 1986 as amended 2005

Human Rights Act 1988

Rules

Family Proceedings Rules 1991, 5-7

Civil Legal Aid (General) Regulations 1989, Regulation 14,

Anglo Pakistan Protocol January 2003 (Red Book p 2647)

Texts

Clark, Hall and Morrison,

Lowe Overall & Nicholls

Family Court Practice

Brussels 2 Revised Practice guide

Europa Website summarises the relevant child law for each EU state to help get to the starting line on foreign law.

Google provides a helpful start

2 JURISDICTION : THE THREE SYSTEMS FOR INTERNATIONAL CASES

Where children are abducted to and from England and Wales from overseas the system depends upon:-

- (I) Where the other State is EU and a signatory to the Hague Convention. If so Brussels II revised applies with special modifications to Hague Convention Law
- (II) Where the other State is not EU but is a signatory to the Hague Convention, the Hague Convention applies.
- (III) Non Convention or EU cases under the inherent jurisdiction welfare principles are applied to the question of whether the child should be returned. Wardship is flexible in concept and practice in this area. .

See FPR 1991 rules 5 and 6.

3 ACCEPTING THE CASE

See the Law Society Guidance on Child Abduction. Do not accept the case unless you have the resources to act quickly and have the appropriate expertise. A solicitor slow off the mark was ordered to pay damages to enable the mother to go and fight for the return of her child from Morocco. To be accessible your client and the Tipstaff need your mobile number all weekend.

4. INSTRUCTIONS

The following is a checklist. If a case has come through the Central Authority in an incoming case much of this will have been covered already:

- (i) Name, address d.o.b. of child, parents and all those with parental responsibility
- (ii) History of where child has lived and how your client came to be here.
Discuss where the child might be taken if abduction occurs
- (iii) What threats to abduct have been made, when, in what circumstances
- (iv) Mobile and landline phone numbers of where child is /might be
- (v) What court orders exist and/or are in process of being sought here or elsewhere (see below : this is important)
- (vi) What and where are the passports of the child and relevant adults.

- (vii) If imminent flight is a concern ascertain what airline and flight is planned if possible. A Port Alert is in practice ineffective unless you can give the police full details of the likely flight and airline. The system at present automatically searches all people entering the country but not those leaving
- (viii) Where has the child been habitually resident
- (ix) Consider whether this is a Brussels II case a Hague case, a Scottish case or neither
- (x) Briefly discuss welfare issues. Remember that child abduction law is less about welfare than forum
- (xi) What documents exist which are relevant? Immigration/disembarkation cards, air tickets claims for benefit?
- (xii) Likely address of abductor in England and elsewhere
- (xiii) Names and addresses etc of close relatives and friends of likely abductor
- (xiv) Bank accounts and numbers of abductor if the whereabouts of the child is not known
- (xv) Ascertain whether proceedings are on foot outside the jurisdiction and if so obtain as much detail as possible as well as the details of the lawyers acting abroad. Speak to the foreign lawyers as soon as possible to find out what is going on. Be particularly circumspect.
- (xvi) If proceedings are pending elsewhere your client may have no business pursuing the matter before an English court at all and may find herself on the wrong end of an English order to return to the place of the child's habitual residence, and be exposed herself to prosecution for child abduction.
- (xvii) Consider whether you are going to need the help of a foreign lawyer. REUNITE will provide you on the telephone with names from a good updated database
- (xviii) Be careful not to encourage disobedience of any court including a foreign court order or your client might be in serious difficulty. A common situation is: "I have returned from Malta where I was miserable. Please start proceedings for a residence order". The client may well have wrongfully removed in breach of the Hague Convention and if she does not organize a legal removal in Malta, or establish that F has agreed to the relocation she

may be ordered to return to Malta as an abductor following Hague proceedings in England and then be in great difficulty

- (xix) Consider the orders below which can assist location
Consider whether the child will cooperate in a return order? What will the child tell a CAFCASS officer about returning/staying?
- (xx) Remember that if a child is 14 or thereabouts in many cases the litigation is “child driven” as it is in private law proceedings.

In most cases 1 ½ hours is needed to take instructions. By then you have formed a strategy

5. WHAT PRACTICAL STEPS CAN BE TAKEN TO PREVENT ABDUCTION

See the REUNITE pack : this may be downloaded from the internet.

6. IS SELF HELP AN OPTION

Certain types of self help are legitimate to prevent abduction for a few days. If a client has a reasonable fear that abduction may occur you can properly advise that he or she may

- Offer to place all passports reciprocally with solicitors.
- Hide the passports of potential abductor and child
- Withhold contact until the matter comes to court
- * .Go into hiding with the child for a few days;

7 WHAT COURT REMEDIES ARE AVAILABLE TO PREVENT ABDUCTION

Consider applying ex parte in the High Court for:

- a prohibited steps order
- an order for delivery up of the child’s UK passport on the authority of a Circuit Judge
- order restraining issue of passports;
- an order restraining the other parent from removing a child from his residence
- an interim residence order
- A bond for return of the child after contact

- The police may put in place a Port Alert although with the volume of traffic at air and channel ports these are of doubtful efficacy

8 ACTING FOR THE LEFT BEHIND PARENT WHEN A CHILD HAS BEEN BROUGHT TO ENGLAND WRONGFULLY FROM A EUROPEAN (B2R) OR HAGUE CONVENTION STATE

COMMENCING PROCEEDINGS : PROCEDURE

The Family Proceedings Rules 1991 Part VI 5-6 sets forth the rules for Hague Convention and wardship summonses. This should be read in conjunction with the Child Abduction and Custody Act 1985. Keep them constantly in mind. For example remember that in Hague Convention proceedings there may be several Defendants pursuant to Rule 6.5. The rules are now under review and there will be new rules in 2010. Habitual residence is a difficult topic. .

In a Hague summons you must assert a specific day for wrongful removal or retention. You can plead in the alternative. The summons must be sufficiently particular.

There are limited Hague Convention defences. There are important cases on the meaning of the Article 13 defences Acquiescence and the threshold of Risk of grave harm and intolerable situation. (Rayden, Clarke Hall Morrison and Lowe Everall Nicholls 2005 and the Family Court Practice are all useful).

9. VENUE

The proceedings should be issued with a view to the proceedings taking place in London unless you are sure that the Plaintiff will not be prejudiced by lack of a number of expert High Court Judges outside London. Deputy High Court Judges and section 9 Judges should not deal with Hague and Brussels II cases.

10. THE FORMS

It is permissible to “hybridise” the Originating Summons so as to seek relief in the alternative under the Hague jurisdiction and the Inherent jurisdiction. In a Hague incoming case where you have the advantage of non merits or means tested public

funding. This inherent jurisdiction can be useful if you meet a technical hitch under the Hague jurisdiction.

11 THE ROLE OF THE CENTRAL AUTHORITY

The Central Authority for England and Wales Child Abduction Unit provides a referral service for “left behind” Plaintiffs both in England and abroad. The telephone number is 0207 911 7047. An incoming Hague case may have come to you via the Central authority. If not then still consider it a useful resource. The Central Authority in each Hague Convention signatory state is under an obligation to advise and assist on issues of international and domestic law. If a case is processed through the Central Authority there will be non means tested public funding more readily available. The London staff will guide you to the contact details of a foreign Central Authority who in turn will help you find suitable foreign lawyers. I have spent time usefully discussing a case for example with the Irish Central authority and the Canadian

12. DO OTHER HAGUE COUNTRIES OPERATE AS WE DO

A country by country approach is needed. Few countries resource their central authority as we do.

The Guide to Good Practice under the Hague Convention (2003 Family Law) explains the desirable practice for each signatory state. A number of States seem less rigorous in returning to England. In particular Articles 12 and 13 are approached differently in other States. Outside the EU we cannot do anything about that. The USA are keen to prosecute a returning abductor and to extradite a non returning one. Delays in eg Spain are a problem. In many states there is an automatic right of appeal from a decision to return or not return which creates delay. (eg Spain)

An application may be made in England after a non return order by an EU state (other than Denmark) under the Hague Convention Article 13 (grave harm) in England requiring return pursuant to B2R Article 11. Article 11 of B2R is generating a growing jurisprudence as to the practice if a return order has been refused by the B2R state. Re A 2006 EWHC 3397 [2007] FLR 1923. Singer J. Re A Ha v Mb EWHC 2016 Singer J [2008] 1 FLR 289. Singer J. explains the jurisdictional implications of Article 11

applications. He pointed out that that the FPR 1991 do not address these applications comprehensively. He urges that the child should be separately represented. In RC v BC [2009] 1 FLR 5734 he decided it was unable to make a B2R Article 11 (7) order because the refusal to return had not been under Hague Article 13 Singer J decided that he could not treat the decision as an Article 13 refusal, although the Portuguese court had in the courts view made surprising findings.

The Practice Guide available on the internet explains the practice relevant to B2R Article 11 applications, whilst not laying down law. Page 36 emphasises the need for speedy resolution. Page 41 states it is likely that the abductor and the abducted child will not travel to the Member State of Origin to attend the Article 11 proceedings.

13 CONTACT AND MEDIATION

Many Hague Applications are an anguished plea for contact by the left behind parent. Most Defendant abductors are mothers returning home to their state of origin when the relationship with a foreigner has broken down. Most are unaware of the Hague Convention and most of them cannot understand why they should have to go back to a place where they are unhappy and life has little to offer.

Inform Plaintiff clients that if they succeed in procuring the return of the child the abducting parent may well make a successful application for leave to remove back to England, and the Hague return order will merely have prolonged the agony. Inform Defendants that if they offer enough contact the Plaintiff may back off his Hague application. If parents can reach an accommodation it is in their interests to do so. It is the realization of this aspect that has given clients the incentive to mediate or agree generous contact to the left behind parent which in 2 cases in 2009 in which the author has been involved led the Plaintiff to abandon his case for return. If agreement is reached the lawyers will draft an order reciting inter alia that it is agreed that the children shall reside in England and by consent make what should be enforceable international contact orders

14 EFFECT ON PROCEEDINGS IN ENGLAND

Clients quite often come to England with a child wrongfully and start proceedings under the Children Act 1989 for a residence order. When Hague Convention proceedings are on foot in England alleging that the child is here as a result of Hague wrongful removal or retention all other proceedings here will be stayed pursuant to CACA 1985 section 9 and Article 16 Hague convention until the Hague proceedings are finished. The Court has a wide power to take interim steps to protect the child when here pending the Hague hearing (CACA 1985 s.5 and Article 20 B2R)

15 HOW DO YOU SET ABOUT FINDING A CHILD TAKEN ABROAD

You can obtain location orders, and invoke the remedies discussed below. Act quickly if there is even a risk. Get in touch with the Central Authority in a Hague case and the Foreign and Commonwealth office Tel 0207 7008 0878 fco.gov.uk. in a non Hague non Brussels 2R case. Interpol may help. Your client will need a foreign lawyer in the other country. There have been some conspicuous successes in recovering children with the help of the FCO. Japan is a black hole.

16. INTERNATIONAL LIAISON JUDGE

Lord Justice Thorpe is proactive in liaising with a foreign Judge to assist eg as to when and where the matter can come back to court if a child is returned. How far international judicial liaison helps depends on what is done in the other second state.

17 DANGER OF IMMINENT FLIGHT

You may seek an order without notice by phone from the Duty Judge. The Judge will not grant the order unless you have your tackle in order. Give an undertaking to issue proceedings on the next working day. You need full instructions for your statement and the summons so as to inform the Judge. You telephone the switch board and give a number where the judge can ring you back.

18. CHILD HAS DISAPPEARED

If a child has disappeared a “seek and locate” order may be needed. This is only available in the High Court from the Tipstaff. A location order will not be made if the child has left the country

19. TIPSTAFF

If the assistance of the Tipstaff is required telephone him first and explain that you will be applying to the Duty Judge. The Tipstaff will liaise with local police when you have the order which he will execute. There are three types of common Tipstaff orders:

- A “passport order” which directs the Tipstaff to take custody of passports and ID documents of the abducting parent and child. This order includes a “stay put” order directing the abductor not to remove the child from its place of residence and prohibits removal from the jurisdiction
- A “seek and locate” order . The Tipstaff is mandated to find the child. The order includes the passport and stay put order and prohibited removal clause. It is also backed with a bench warrant.
- A “collection order”. This includes the orders above and mandates the Tipstaff to collect the child. This is almost never granted ex parte. The judge will always want to know what the other parent has to say. The Judge will always be reluctant to make the order
- Remember that the Tipstaff’s ability to find the child is in practice as good as the leads that you give him. He contacts the local police and provides information which will assist in location provided by you. If a child is missing if the Tipstaff is of the view that a person such as a relative has not cooperated with provision of information will bring that person to court for cross examination.
- The orders are drawn up by the Tipstaff and executed by them before service on the Defendant abductor of the Plaintiff’s summons or without notice orders. The Tipstaff is very strict about this because of fear of tip off which may prompt another disappearance.
- At the Ex parte first hearing there will be a direction that the Defendant is to attend on the return date but note>>>.
- When a child has been located by the Tipstaff the Tipstaff will fix a return day before a judge a few days later. This can be inconvenient to practitioners

20 DIRECTIONS AT THE FIRST HEARING WITHOUT NOTICE

The order will be tailored for the particular circumstances and will include in most cases

UPON THE UNDERTAKING of the Plaintiff to issue the summons annexed hereto within 24 hours

AND UPON RECEIVING the affidavit of the Plaintiff's solicitor dated

And at the time of making this order UPON GIVING directions to the Tipstaff of the High Court of Justice to Locate the said child and obtain the Passport and travel documents of the First Defendant and the said child until further direction of the court to keep safely the documents referred to in paragraph (6) of this order

UPON HEARING Counsel for the Plaintiff the Mother being neither present nor represented;-

- (1) This matter be restored before a Judge of the Family Division sitting at the Royal Courts of Justice, Strand, London WC2A 2LL on a date to be fixed upon notification by the Tipstaff that the said child has been located time estimate 30 minutes.
- (2) The First Defendant shall attend the hearing provided for in paragraph (1) of this order in person as well as, if so advised, by counsel and solicitors;
- (3) The First Defendant shall file a defence to this application within 7-(or 14) days of service upon her of this order and the originating summons herein

IF NO TIPSTAFF ORDER

- (4) The Defendant is in the interim prohibited until further Order from removing the child from England and Wales or removing her overnight from the place where she currently resides.

IF NO TIPSTAFF ORDER

- (5) The Defendant is in the interim prohibited from applying for passports and travel documents for the children or himself until further Order.
- (6) Costs in the Application .

On the return date the Tipstaff orders should either be renewed or discharged

21 STATEMENT

The statement by the solicitor must set out succinctly the facts upon which your client relies. Exhibit the Central Authority referral document. See F.P.R. 1991 rules 5 and 6.

22. PROCESS SERVER

Having obtained the “Without notice” order a process server must serve the Originating Summons and papers as soon as possible after the Tipstaff has informed you that he has executed his order . The Tipstaff will be anxious that you take no action which could tip off the abductor and make the abductor fly again

23 INTERPOL

The Interpol unit is proactive and helpful and will help you find out about local police practice where the child has been removed from England. An international arrest warrant may be issued. Abduction is a crime in many countries depending upon the circumstances as it is in England

24 PREVENTING PASSPORTS FROM REISSUE

PASSPORT OFFICE

If an order has been made that a parent do deliver up passports and not apply for another for herself or the child, write to the Passport office at Peterborough stating that there is a court prohibition upon reissuing travel documents. It is easy to report a passport stolen and obtain a new one in breach of Court order

25 FOREIGN PASSPORT OFFICES

There have been many cases where a party has gone to the London consulate of a foreign embassy and persuaded them to issue a new passport for A and the child in breach of court order. It is worth writing to a London foreign consulate but it may not be effective.

26 HOW DO YOU TRACE THE CHILD THROUGH THE COURT

LOCATION ORDERS

The Child Abduction and Custody Act 1985 section 5 and the Inherent jurisdiction may be invoked to trace an abducted child. See also FPR 1991 rule 6.13. A raft of location orders are available to assist in finding the child.

As interim measures the High Court will make orders such as:-

- requiring mobile and other phone companies to disclose the incoming and outgoing numbers with whom there has been contact between particular dates

- Solicitors are obliged to disclose the whereabouts of a child who is subject to a seek and find order or a child who is a ward of court if directed by the court, regardless of the rules of confidentiality which normally apply. Re H 2000 1FLR 766. The order will include a direction that the solicitor is “not to notify the Defendant of the existence of this order or its contents”
- Publicity may be ordered with a view to finding a child but always consider whether this will drive the Defendant further underground
- The Family Law Act 1986 Section 33 can be invoked to require disclosure where a Part 1 order usually a Children Act order under section 8 is sought.
- The Court may dispense with service on any party in order to avoid tipping off the abductor
- A sequestration of the abductor’s assets may be ordered to produce a fighting fund. If the abductor owns a house for example he is likely not to want to be deprived of the benefit and it may even prompt return
- An order requiring banks to disclose statements relating to specific accounts may show from where someone has drawn or spent money or show where the abductor worked between particular dates
- In respect of government departments see Practice Direction 20.7.95. DWP, Inland Revenue, Dept Health, may be ordered to disclose addresses. An application for social security benefits will show an address. Local authority housing department may have the address. The Health authority can be compelled to disclose the name of the GP. County Education department to disclose whether the child’s name appears on a school register: (they have computerised records). Remember mothers might change a child’s surname for school but not the first name!
- An common order is for a non party usually a relative “do disclose to the Plaintiff’s solicitor/ Tipstaff information in their possession leading to as to the whereabouts of the child.” If the party served denies knowledge they may be made required to attend at the High court to be cross examined under threat of imprisonment for contempt. A penal notice will sometimes be attached
- Information may be directed from airlines but you need to be specific or they cannot help

27. DIRECTIONS COMMON AT THE FIRST INTERPARTES HEARING

The issue of expert evidence and its scope should be considered early

Common directions are:

Upon continuing the passport order to the Tipstaff herein

- 1 The Defendant shall file a defence to this application on or before ..(7 days)
- 2.The Defendant shall file a statement setting forth all matters relied upon in defence on or before (14 days ?) ;
3. The Plaintiff shall have leave to file an affidavit in reply on or before (14 days?).....
4. This matter shall be set down for hearing listed at risk on 10.30.am time estimate 1.5 days (??? *If likely oral evidence : the parties shall attend the said hearing the cost of the said hearing to be a reasonable disbursement for public funding*)
5. The Defendant is in the interim prohibited until further Order from removing the child H from England and Wales overnight from the place where she currently resides.
6. Permission to obtain a joint single expert report upon ???the issue of the Plaintiff's rights of custody in Poland from T. The report shall be filed by 28th September 2009. The letter of instruction shall be agreed by 4pm on 18th September 2009. The costs of the instruction shall be borne by the parties jointly and is hereby deemed to be a proper and reasonable disbursement on the Defendant's certificate of public funding.
7. Cafcass at the PRFD do see P born . to consider his objections to a return to Poland, such officer do file and serve a short report if possible by and be available for short cross-examination unless notified otherwise, on2009; the Mothers Solicitor do arrange for the child to be taken to Cafcass at the PRFD.
- 8 Contact???
9. The Defendant is in the interim prohibited from applying for passports and travel documents for the said child or herself until further Order.
10. Costs in the Application .

28 IS PUBLIC MONEY AVAILABLE: PUBLIC FUNDING GENERAL

Non-means tested public funding is available to Plaintiffs in Hague cases. You have an **obligation** to inform a Plaintiff client of this privileged status, which does not apply to Defendants and does not apply in Brussels II enforcement cases unless the Plaintiff has been publicly funded in the requesting state. Enforcement is not generally publically funded for example to bolster an application in state B to return the child after a decision in England that there has been a wrongful removal

29. OTHER

There is no obligation to provide public funding to enforce or register orders under Brussels 2 revised, unless the party was publicly funded in the State A. When there is an Outgoing Non Hague case eg under the Pakistan protocol funding will be means and merits tested, it is difficult to get public funding, save for an initial declaration of wrongful removal and request to the court to assist .

30. RESISTING A RETURN TO A BRUSSELS 2R STATE (other than Denmark)

A return order may not be refused if the risk of harm on return can be ameliorated by safeguards to take effect on his return to country A (Article 11 (4)). A return order may not be refused unless the left behind parent is given an opportunity to be heard (Article 11 (5)). The court in England is most unlikely to accept that there cannot be adequate access to court, personal safety arrangements, social security in another B2R state. .

31 IS THERE ANY POINT IN INVOKING THE ENGLISH COURT WHEN A CHILD HAS BEEN TAKEN ABROAD BY AN ABDUCTOR

Although a flight will not be wrongful unless it was wrongful at the time it was made it may well be worth obtaining chasing orders such as for an interim residence order under the Children Act 1989

32 ACTION IN ENGLAND BY THE LEFT BEHIND PARENT

Article 16 of the Hague Convention provides that an application may be made for a declaration of wrongful removal. In non Hague cases such as Pakistan and Thailand chasing orders with a view to tracking down the child outside the jurisdiction may be useful. It difficult to persuade the Public funding authority to grant public funding for this. In A v B 2009 1FLR 1253 an order was made declaring under The Hague Convention Article 15 for the French courts that a father had effective parental responsibility in England after an order for PR had been made but not served on the abductor.

33 THE DEFENCE

Directions at the first hearing will include a direction that the Defendant plead the Defence. (Re W 1995 1FLR 878) The Defence should be concise not prolix. This will make you aware of the ambit of dispute

34 WHEN DO YOU NEED A FOREIGN EXPERT

You will know after the Defence has been filed if there is a dispute on which you need expert advice. Eg on the question of rights of custody. For example in England the unmarried father without parental responsibility or a Court order has no locus to bring Hague Convention proceedings as he cannot claim that the removal was in breach of his rights. He did not have rights so the mother's removal without his permission was not wrongful. (*Re J* 1990 2FLR 442 HL). (In some circumstances he may be able to plead that he had inchoate rights). There has been a problem with Polish father's rights of custody in 2009. In some states it may make no difference whether the parents are married. There may be an issue as to whether there was a right vested in the court at the time of removal. At that stage you may need to find a suitable foreign expert. A JSE may be instructed initially.

The question of habitual residence prior to removal will be determined under English law. The English court decides under our own law without experts on foreign law where the child was habitually resident or whether consent was given before or after removal. See e.g.:- *V C* [2003] 1 FLR 252, *Re H* [2003] 2 FLR 153 and *Re F* [2003] 1 FLR 839. This can be a difficult point.

To find an expert try the internet or an embassy or REUNITE ascertain their time frame and cost.

35 COSTS.

In *EC-L v DM (Child Abduction: Costs)* [2005] FLR 772 Ryder J decided that costs could and should be awarded in certain child abduction cases where an unmeritorious Plaintiff had pursued proceedings. The Court had to construe The Hague Convention Article 26 so as to ensure that the parties were broadly on an equal footing. There was no basis on which the Court's discretion should only be exercised when a funded party's lawyer had acted improperly. Unreasonable conduct should include deliberate and persistent falsification of a case in an attempt to deprive the child and the other parent of their rights. Public funding rates are heading south.

36. IS THERE A SPECIAL ARRANGEMENT FOR PAKISTAN:

The Pakistan Protocol of Jan 2003 is based on the concept that disputes relating to children should be heard in the country of their habitual residence before they were removed from Pakistan to England or vice versa. Kashmir is not within the Pakistani Protocol nor is some of the Territory. The F.C.O will guide you.

37. WILL THERE BE ANY NEW ENTRANTS: OTHER COUNTRIES

There are negotiations afoot with Egypt and it remains to be seen what will be achieved in these areas. There are now 80 Hague signatories

38. THE CHILD'S VIEWS AND WISHES VOICE OF THE CHILD

Intra EU when considering the Defences of Articles 12 and 13 of the Hague

Convention Article 11 B2R requires that the Court must ensure that the child has been heard subject to his age and maturity. There is no uniformity throughout the EU on

what is sufficient. In Germany the Judge will always see the child. The French never do.

In England the Judges continue to regard a CAFCASS interview as HRA compliant.

Despite the peremptory nature of Hague proceedings, if these defences are raised seek a direction that the CAFCASS officer see the child and report to the Judge. The report

is usually expedited and limited in scope, following an interview on the morning of the

hearing. If a child is 8 years old a Cafcass report is inevitable in practice. In view of the

emphasis on speed (re iterated by Lord Justice Thorpe in *Vigreux v Michel* 2006 FLR

1180 the cases must be dealt with in 6 weeks pursuant to B2R Article 11 (3) if possible

so a full report is not feasible. The child's objections to return are not definitive even if

strongly expressed. Children usually reflect the views of the parent with whom they are

living. There are many cases where return was ordered despite the child's objections. Eg

M v T 2009 1FLR 1309 (*Klentzeris v Klentzeris* 2007 2FLR 596 CA. Children

hysterically distressed at prospect of return to Greece. I argued they had been

manipulated by the mother and the CAFCASS officer had not appreciated the effect of

the Plaintiff's protective measures offered. Appeal against non return order dismissed.

The Greek Court later refused to order the return under Article 11 on application by the father)

39 SEPARATE REPRESENTATION OF THE CHILD

In a few cases the child will be separately represented. In Re D 2007 1 FLR HL in Re F 2007 Fam Law 556 CA it was reiterated that only in unusual circumstances will the Child be joined as party. Ryder J in Re C 2008 2 FLR 6 considered and applied the law. He directed separate representation of all the children and that the children of 16 and 14 should be permitted to instruct their own solicitor

40 TIME LIMITS

Hague and B2R proceedings are a summary remedy. High Court time priority is given. Hague cases are hard work for practitioners. Note the comments on Non Hague cases below: it is harder to persuade a court to make a peremptory order for return in wardship, without a fuller welfare inquiry which always slows the proceedings. Re J 2005 FLR HL.

41 TIMING

Adjournment of proceedings in Hague cases should not be for more than 21 days(FPR 1991 rule 6.10) but in practice this rule is honoured in the breach. In Brussels IIR cases the Court is required to deal with the case expeditiously usually within 6 weeks (Article 11(3)). The edict has come down from the Court of Appeal that this must be followed

42 THE HEARING : ORAL EVIDENCE

Most cases are dealt with without oral evidence. A party seeking to adduce oral evidence to resolve an important issue of fact still faces an uphill task because of the delays which ensue by extending the court time needed. In Re H 2006 per Thorpe L.J. questioned whether Brussels IIR Abduction cases should be determined ever on the basis of oral evidence. Refusal to allow oral evidence is within the ambit of the judges discretion. Alert practitioners on the basis of written evidence can nearly always extrapolate relevant factors pointing to or from an immediate order for return. A Defendant abductor will often play for time arguing that there should be oral evidence. Evidence by videolink

from court 38 is often directed where oral evidence is needed. Find out whether your client can get to a video centre in the relevant state.

43 PROTECT A RETURNING ABDUCTOR WITH UNDERTAKINGS AND ORDERS TO PROTECT THE CHILD UPON RETURN

It has become usual for undertakings by or orders made against a plaintiff as a prerequisite to a return order to protect the returning child and parent for a short period before the matter comes before the foreign court. Acting for a Plaintiff you must expect to be pressed by the Judge to have instructions on the relevant points. You will be pressed for example on how long it will take to obtain a hearing date in the foreign court if the child returns with the abducting parent, and how litigation will be funded. Acting for a Defendant you need to focus on what your client needs if he or she is to return with the child

Failure to comply with conditions or undertakings made by the English judge is a reason for refusal of enforcement of the return order. The undertakings most commonly sought are set forth below. If you are acting for a Plaintiff there is a real likelihood that your client's arm will be twisted to give undertakings to protect the child on return and to support the returning abductor. The Plaintiff client often feels wronged and resentful at this. He or she will be tempted to break the undertakings once the children are home. The author has had an unhappy case this year where the undertakings were broken with impunity when the children arrived back in New York

44 SETTLEMENT

Where a child has been in England for more than one year *Re M* 2008 1 FLR 251 addresses the principles to be applied in considering whether the child is so settled within the convention that the discretion to refuse to return will be refused. The arrangements for the child on return should be scrutinised by the Court in considering whether to order return: school, housing, support, relationships are all relevant.

45 EXAMPLE OF UNDERTAKINGS OR CONDITIONS INCORPORATED INTO THE FINAL ORDER

Plaintiff undertakes :-

- (1) Not to seek to enforce and/or require implementation of paragraph 1 of the order herein for the summary return of the child, to Portugal before..... (*end of school term*)
- (2) Not to enforce and/or seek to implement the order of the ...Family and Children's Court dated in cause number..... granting her provisional custody and care of the said child until the matter has been placed before that court at the first *inter partes* hearing in Portugal;
- (3) To use her best endeavours to obtain an expedited date for *inter partes* directions in the cause at the said District Family and Children's Court as soon as possible after
- (4) To take such steps as are open to her to ensure that no criminal proceedings are pursued against the Defendant father in respect of his wrongful removal of the said child from Portugal in
- (5) Within seven days to provide through her English solicitors full details of her solicitors in Portugal to the Defendant father's English solicitors.
- (6) Not to meet the child at the airport upon return to Portugal

Defendant Undertakes

- (1) To issue such applications and/or further applications as may be advised in the said District Family and Children's Court and to obtain an expedited date for *inter partes* directions in the said cause at the said court as soon as possible after
- (2) To advise the Mother's solicitors, Messrs ., as soon as reasonably practicable and in any event no later than 48 hours prior to his departure of:
 - (i) Details of his solicitors in Portugal;
 - (ii) Details of his and 's proposed travel arrangements, to include date, flight times and numbers, ports of embarkation and destination;
 - (iii) The address at which C will be living after her arrival in Portugal and a telephone number upon which thereafter he and C can be contacted in Portugal.
- (3) To lodge his passport and C travel document as soon as reasonably practicable after his arrival in Portugal (and, in any event, within twenty-four hours thereof) with the Portuguese solicitors identified by him pursuant to his undertaking at 2(i) above, SAVE THAT if for any reason he is unable to lodge the said documents as herein provided for he shall forthwith lodge the same with the mother's Portuguese solicitors;
- (4) To facilitate and make the child available for contact with the mother (i) in England whilst the mother is present in this jurisdiction and (ii) in Portugal when C has returned to that jurisdiction.

46 A FINAL HAGUE ORDER FOR RETURN

The child X C H shall be returned to Alabama between 25th and 28th ... 2009

2. The Plaintiff father???? shall be responsible in defraying the cost of X's air ticket and transporting her to Alabama, and further shall defray the cost of the Defendant mother's air ticket in the event that she notifies him that she intends to accompany the child to Alabama, such notification to the father to be no later than 12.0 noon on 13th 2009 (the father in this event shall be entitled to select the carrier route).

3. In the event that the Defendant mother decides not to accompany X to Alabama the father shall travel to the jurisdiction of England and Wales to collect X and return her to Alabama between 25th and 28th February 2009

4 The Plaintiff father shall use his best endeavours to obtain an expedited court hearing in Juvenile court Alabama which shall in any event be no later than 28 chronological days from X's arrival in the jurisdiction of the State of Alabama

5. In the event that the Defendant mother decides to accompany the said child to Alabama or to return thereto to pursue her Application for joint / sole custody of X (and such other orders as she deems fit,) the father shall provide evidence 7 days prior to her departure that he has paid \$400 into an account in Alabama to which the mother shall have access.

6 The Plaintiff father shall use his best endeavours to ensure that any warrant for the mother's arrest is set aside and that no step is taken by him or the 2nd and 3rd Defendants or any law enforcement agency in the USA so as to lead to the First Defendant mother's imprisonment or other sanction

7. Copy of the judgment herein and the bundle prepared for the hearing dated 2009 shall be disclosed to the Juvenile Court, Alabama, together with the Schedule of points prepared subsequent to the videoconference between the Plaintiff and First Defendant which took place on 7th 2009.

8. An expedited copy of the judgment shall be prepared and delivered to The Hon Mr Justice .. within 7 days of today by electronic transfer (initially to the parties solicitors)

9. In the event of any further procedures in this jurisdiction this matter is strictly reserved to the Hon Mr Justice

10. The Tipstaff is hereby directed to release the travel documents held by them in this matter forthwith to the Plaintiffs' solicitors to be held by them until X leaves the jurisdiction

11. In the event that the First Defendant elects not to accompany X to Alabama pursuant to the return order herewith the Plaintiff's solicitors be permitted to deliver up X's documents to the Plaintiff 48 hours prior to the scheduled departure time of the flight to Alabama.

12. In the event that the First Defendant elects to accompany X back to Alabama the Plaintiff's solicitors do release both her and X's passport to the First Defendant at the point of embarkation from the jurisdiction to Alabama.

13. In the event that the First Defendant does not accompany X to Alabama the Plaintiffs solicitors shall deliver up to the First Defendant's solicitors her passport forthwith after X's departure

14. Upon X C H leaving this jurisdiction paragraphs 4 and 5 of the order dated 25th June 2009 and paragraphs 6 and 7 shall be discharged

15. No order costs save for detailed assessment of the Plaintiffs and first Defendants publicly funded costs (it being directed that all cost associated with the videolink conference held on 7th February 2006 are a reasonable necessary and proper charge on the publically funded certificates

47 ENFORCEMENT OF HAGUE RETURN ORDERS FROM ENGLAND

At the hearing the Defendant will often have argued that there should be a postponed return date so that the child can finish school term or enjoy half term or whatever. Either party may apply to the court to enforce or suspend a return order before it is executed. For example the 14 year old runs away at the airport; the child threatens suicide; the abductor goes on the run. The court can make collection order and will do so in the proper case. There can be argument as whether the undertakings have been complied with. We usually enforce our return orders with vigour. Other states do not. There can be a direction for execution and enforcement pursuant to section 33 FLA 1986 to execute a Children Act 1989 order or by the use of a Tipstaff collection order.

48. Other Hague countries do not enforce with the vigour that the English do There is no criteria of good behaviour as a requisite for joining the Hague club. The author is informed that in Zimbabwe, a Hague country, enforcement of an order for return to

England will not be achieved without a large “drink” for with a Court or police officer.

Meanwhile a Hague return application to Zimbabwe succeeded.

49 RETURN TO ENGLAND OF ABDUCTED CHILD

When a child has been returned following the order of a foreign court one party or another will have commenced proceedings in England to regulate the situation. The child may well be a Ward of Court and the case will proceed at High court level. Consider whether the case should henceforth proceed as an ordinary Children Act dispute and at what level.

50 SPECIMEN ORDER : first interpartes hearing in England after return

UPON both the Plaintiff and First Defendant both undertaking (other than by prior joint written agreement lodged with their Solicitors) not to remove the child M from the jurisdiction of England & Wales and b) not to permit him to reside other than at 6..... Road, B. or until further order of the Court

IT IS ORDERED THAT:

1. The Wardship herein is hereby discharged;
2. The Second Defendant (*grandmother*) is hereby discharged from these proceedings;
3. This matter shall be transferred forthwith from the High Court to theCounty Court for hearing by aJudge and proceed under the Children Act 1989;
4. The Plaintiff and First Defendant shall forthwith deliver up their respective passports to their current Solicitors who shall hold them to the Order of the Court pending conclusion of these proceedings;
5. The passport of the child M shall be held by Messrs Ross & Craig to the Order of the Court pending conclusion of these proceedings or further order;
6. The parties shall file statements by 4pm on (*14 days*) limited to the question of their future plans for care and contact;
7. The CAFCASS Officer is requested to report upon the issues of residence and contact by 4pm on (*14 weeks* 2007) and is to attend the final hearing of this matter unless advised no less than 7 days in advance of the hearing by both the Plaintiff's and First Defendant's Solicitors in writing;
8. This matter is to be listed before a Circuit Judge for PTR with a time estimate of one hour on the first available date in the week commencing and for final hearing T.E. 2-3 days on a date to be fixed by Counsel's clerks;
9. Pending final hearing the child .. shall reside at
10. Contact

51. PURGING CONTEMPT

There is little consensus on the way that abductors are to be treated on return. Orders can be made on application for “safe harbour” orders to last until the matter comes before the High court a few days after return. The child will be separately represented in some cases

In a recent case the father went on the run after he had failed in the court of Appeal to over turn the return order to Hungary. Eventually from cyberspace he said he would deliver the child on a particular day. The desperate mother instructed her lawyers to agree to suspend the collection orders etc so as to give the best chance of return to the mother. The father did deliver up the child after 2 months on the run and will not be punished here because the mother has not instructed the lawyers to pursue committal proceedings.

52 CONTACT OUTSIDE THE JURISDICTION WHERE THERE ARE ABDUCTION RISKS

If contact outside the jurisdiction is an issue post return the terms may be difficult. In a case involving an Eastern European father whose children were eventually permitted to stay in England it was necessary to ascertain what safeguards if any could be put in place, Lord Justice Thorpe acting as international liaison judge was approached and found a local judge to assist the Court. Expert evidence was obtained as to what remedies were available in Croatia if the father reneged on his promise to return the children. You need to explore in some cases what the range of remedies for breach is in the other state

53 A SPECIMEN LETTER

The letter asked the judge to address the following:

In the event that the children were to have contact pursuant to English court order to their father in Croatia and the father failed to comply with an English court order that they be returned to England at the end of say a visit, the questions upon which we seek your opinion are as follows:-

- (a) Please explain what process exists to ensure the prompt return to England of the children, particularly in the light of the mother's concerns expressed above
- (b) Please explain how the mother or the children's Guardian would access the Croatian courts or other empowered authority in order to ensure compliance.
- (c) Please indicate your view of the likely timescale for obtaining and executing an order for return of the children from Croatia to England and the approximate costs that might be expected
- (d) Please express your view as to whether the Croatian police would enforce an English court order for return to England and what steps would be necessary before invoking their assistance.
- (e) Please state what order by consent in advance of any visit can or should be lodged in the Croatian court or other institution to ensure that the children be returned to England promptly at the end of any agreed or ordered contact
- (f) In the event that the children were retained in Croatia in breach of English court order for a significant period, say three months, is there a risk that the Croatian court or other institution would decide that (despite the English court order) for example that the children had obtained habitual residence in Croatia and that thereafter the Croatian authority would not be obliged to enforce the English court order for return
- (g) Will the mother who habitually resides in England be able to obtain public funding for any necessary litigation in Croatia.
- (h) Will the father who is habitually resides in Croatia be able to obtain public funding for any necessary litigation in Croatia.
- (i) Can the father obtain proof of any or all of the matters now concerning the mother in relation to current Croatian police and court documents and activity if any and if so how long can this be expected to take
- (j) With the father's authority can you obtain the relevant documents on his behalf?
- (k) How long would the search for court documents be expected to take, given that the search may need to go back to 2002.
- (l) Please comment upon any other matter which in your view is relevant to the issues above and please do not hesitate to contact us if you require further information.

54 WHAT ARE THE HOT TOPICS ?

Among the current issues are:

- The concept of habitual residence is central to the Brussels 2 revised jurisdiction and to the Hague Convention 1980; and under English law to the Domicile and Matrimonial Proceedings Act as amended. The place of a child's habitual residence is often hotly disputed. Nowhere in Brussels 2 Revised is the concept defined. There have been 2 cases on habitual

residence in the last year. P-J 2009 EWCA 588.(on appeal to the Court of Appeal from the President) In April 2009 the ECJ provided long awaited clarification to the proper definition of habitual residence. In [Case C 523/07](#), promulgated that intra EU an autonomous EU definition of habitual residence must be applied. (This is not quite consistent with P-J)

- If a Hague application fails the Plaintiff can fall back on the inherent jurisdiction to order return. Re J HL 2005 seek a return order within wardship. At that stage welfare principles will be applied and unless the welfare aspect obviously favours trial on the merits in the foreign state the welfare inquiry will delay resolution.
- How far can or will an English court go in enforcing or modifying a foreign court order for contact.? It is regrettable that Article 21 of the Hague Convention which concerns contact has no teeth. Practitioners would like to see this done
- Education: All of the new EU accession countries are parties to Brussels 2 Revised and few lawyers in those countries are likely to have been trained in the interaction between the Hague Convention 1980 and Brussels 11 revised. Clients are tempted sometimes not to tell the truth, but that they were told by their lawyers that “there was nothing to stop them leaving” is often believable

55 CONCLUSION

All the signs indicate an increase in international litigation affecting children and the need for judicial guidance on the evolving law

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