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Cross-border child removal issues plague NRI families

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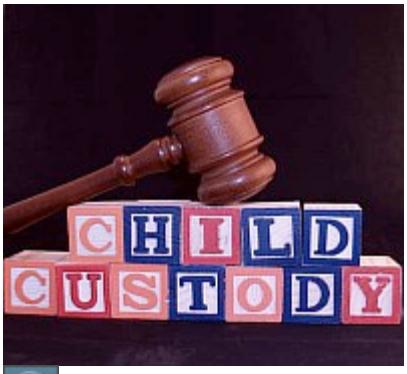

There are over 30 million NRIs, PIOs and overseas Indian citizens spread across 130 countries. Accelerated cross-border migration of Indians acts as a catalyst to multi-national matrimonial relationships.

The spontaneous fall-out of broken cross border marriages, dual jurisdictional matrimonial disputes and enforcement of custody orders of foreign courts has led to the problem of 'inter-parental child removal' when non-resident Indian parents remove their children to India either in violation of a foreign court custody order or in infringement of the other spouse's parental rights.

Another new alarming feature experienced recently relates to reverse removal of Indian children to foreign jurisdictions either against parental consent or in violation of an Indian Court custody order without consent for removal.

The Hague convention on civil aspects of international child abduction, 1980, a multilateral treaty developed by the Hague Conference on Private International Law provides an expeditious method to return a child from one member nation to another.

The Hague Convention has 80 nation member signatories but, sadly, India is not a part of it. The convention seeks to protect children internationally from the harmful effects of their wrongful removal or retention and ensures their prompt return to the country of their habitual residence.

Inter-parental child removal is neither defined in any Indian legislation nor is it an offence under any statutory law in India. This is again compounded by the fact that India is not a signatory to the Hague Convention. Hence, the only expeditious and effective remedy most sought after in matters of inter-country child removal is by invoking the writ of habeas corpus in a high court directly to secure protection of the life and liberty of children detained by one parent either against the children's wishes or the other parent's rights.

Different high courts within India have different precedents on the maintainability of such a petition due to lack of any codified law on the subject and it may sometimes be extremely difficult to establish that children are in illegal detention of a parent.

The Supreme Court considers a foreign court custody order as only one feature for consideration in such matters. Alternatively, upon the aggrieved parent being relegated to seek guardianship orders of their own children under The Guardian and Wards Act, 1890, a tedious, time consuming and cumbersome procedure follows which is riddled with delays and it often frustrates the entire exercise since a desperate parent may not even achieve visitation rights, leave alone the custody of children.

Surprisingly, the Hindu Minority and Guardianship Act, 1956, does not even have any independent provisions for making an application for obtaining a guardianship order. The result, children are reduced to being a trophy to be won by a parent with superior rights. The welfare of the children being the paramount consideration is nowhere to be seen.

There are now reverse cases where children are also being removed from India to foreign jurisdictions. Conflict of jurisdictions often leads courts to pass orders whose implementation in either country is practically very difficult.

As a result, one sees more and more cases where children removed to India never go back to the country of their habitual residence and also now of children not being returned to India upon their forcible removal abroad. The result, a complete deadlock with parents in misery in different countries and children growing up with single parents. All this while, lawmakers sleep over the problem oblivious of viable solutions.

Thus, today, removal of children across borders has acquired a dual carriageway dimension. Earlier, cases of foreign children brought to India against parental consent were common citations. Now, slowly, even the reverse is becoming a reality and child removal from India is making the problem a two-way street.

However, how would Indian courts deal with situations when Indian children are removed to foreign jurisdictions in violation of local court orders or parental wishes. Which law would apply and how would it extend to a foreign country.

Clearly, there is no international instrument that can be invoked and the only remedy with the aggrieved parent would be to invoke the national law of the foreign country where the child is wrongfully retained. Easier said than done. Tough visa formalities, high travelling expenses, expensive litigation costs and difficult foreign court procedures would be insurmountable deterrents. It seems that the problem defies solutions and workable remedies.

A recent glimmer of hope was seen in the making of the Indian Civil Aspects of International Child Abduction Bill, 2007 circulated for comments. It sought to create the mechanisms and systems of implementation before the Government of India acceded to the Hague convention.

However, till date nothing has progressed further and grave issues of child removal are in a limbo and a flux. Legislators need to seriously consider enacting a law on the subject and the Law Commission of India which evinced great interest could aid and abet constructing the framework of a legislation on it.

Maybe, the Pravasi Bhartiya Divas 2009 could be a platform to generate momentum for making a law on the subject. Till then, the stalemate prevails and the courts pursue their tireless efforts in deciding each case on its own facts to dispense justice individually by tailoring a solution every time.

The author with specialises in NRI family laws and has coauthored the book, 'Acting for Non Resident Indian Clients' (London, 2005). He can be contacted at anilmalhotra1960@gmail.com