

Hague convention no slam dunk

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For Law Times

The Hague Convention on the Civil Aspects of International Child Abduction is a powerful tool in signatory countries where the rule of law prevails, but many treaty members don't meet that criteria, making it a challenge for lawyers who try to fix the problem after the event. As a result, a new emphasis on prevention may be the only answer to an increasingly prevalent problem.

The Hague convention is a multilateral treaty aimed at providing an expeditious method to return a child under the age of 16 abducted by a parent from one member nation to another or wrongfully retained in a contracting state that's not their country of habitual residence. The purpose of the convention is to preserve whatever child custody arrangement existed immediately beforehand and to prevent jurisdiction shopping.

Andrew Feldstein of Feldstein Family Law Group in Markham, Ont., describes it as the one place where a family law judge doesn't look at the best interests of the child. Toronto family lawyer James Marks agrees. "The underlying policy is not to deal with issues of custody," he says. "The critical thing is which country gets to take jurisdiction and decide the question of custody."

Mary Damianakis, president of Family Mediation Canada, has seen an increase every year in the number of children taken

across borders. "It's definitely on the rise," she says.

In 2010, the latest year for which figures are available, Canada had 74 outgoing cases and 29 incoming matters. Damianakis feels the deterrent aspect of the convention isn't necessarily working. She cites a lack of consistency in its application in different jurisdictions. "As more countries sign on, the more la-la-land it becomes. For example, with binational American and Russian couples, there may be court-ordered visitation with the grandparents. Russia is a member but hasn't ratified the treaty, so forget it. They almost never come back."

There are currently 195 countries that are a party to the convention. Marks has had good experiences with the Hague convention, usually acting for the parent looking to have the child returned. But Feldstein says it depends on the country the lawyer is dealing with. "Some courts are more effective. We've seen very high-profile cases where parents have struggled for years in countries where the rule of law is not as strict as here. It's no slam dunk."

Marks describes the convention members as part of a club. "It is really important that all the countries apply it uniformly. There are certain countries that may not move quickly and expeditiously to a hearing." He recalls a case in Brazil that took 10 years to reach its top court. "That is one of the problems."

Another issue is the failure to

apply a similar threshold for the exceptions in Article 13 that address situations where there's a grave risk of exposing the children to physical or psychological harm or placing them in an intolerable situation if authorities return them. "In Canada, judges generally place a very high threshold," says Marks.

"I've never had a judge refuse to return a child based on Article 13. When the left-behind parent proves that the child is habitually resident in a country, it is extremely likely that they will be returned."

However, there have been some recent decisions that some critics say have weakened the convention in Canada. Phyllis Brodtkin of MacDonald & Partners LLP is a strong proponent of the convention but has been involved in several controversial cases. Most recently, in *Husid v. Daviau*, the Canadian-born mother living in Peru got permission for a vacation and never returned. Brodtkin successfully invoked a defence relying on incessant ongoing abuse and harassment of the mother rather than the children.

"The defence in Article 13(b) was always applied to abuse of the child," she says.

"There is a consensus that it has been expanded by recent cases to cover the spouse."

The unspoken aspect of the proceedings was what Brodtkin describes as the "strange" nature of the court system in Peru. There were already about 18 court orders. The Ontario Court of Appeal let the mother stay and the Supreme Court dis-



Andrew Feldstein believes there should be more severe punishment in child abduction cases.

missed an application for leave to appeal on Feb. 14, 2013.

Critics have suggested the court has lowered the threshold, but Brodtkin is adamant it based the decision completely on the current test and properly decided the matter.

One area that everyone agrees needs more attention is prevention. "If you are representing the parent who doesn't have custody all the time, you have to be extremely careful," says Marks.

"If they do not have the child in their primary care, they need to secure some kind of custody order and a non-removal order."

Damianakis believes there's a strong role for mediation. "People lose control of their lives in court. The process is not complex, but once you've made an application, all the different scenarios tend to be lumped together even if a spouse has merely delayed their

return. Mediation can defuse that situation. It is a much more humane way than court."

Damianakis has seen cases where the parents are discussing the possibility of the children going somewhere that involves a high risk. "What can be done? In mediation, they may agree that it is a safer or better place to live for financial reasons or personal reasons. They may agree on how they will come back or arrange access visits."

At the other end of the process are the deterrents, namely the possibility of criminal charges or the effect on future custody. "If the concerns about the left-behind parent are not terribly significant, the retainer is seen as a potential flight risk," says Marks.

"It also indicates they are not as likely to promote a relationship and access with the other parent. These are significant factors that the judge will take into account when considering custody."

But criminal charges are very rare, according to Marks. "Often, there are no costs being awarded either. My experience is that the left-behind parents are not pushing for that if it's involving family members. A lot of times, everyone's up front. It's not a big manhunt. There are usually reasons why the parent retained the child. They've just gone about it the wrong way."

But Feldstein is of the view that there should be stringent punishment. "There should be strong consequences that act as a light bulb that says they are playing with fire." **LT**