

INTERNATIONAL
CHILD
ABDUCTIONS

Presented by:

Ronald D. Litvak and Courtney J. Leathers

Litvak Litvak Mehrstens and Epstein, P.C.

1900 Grant Street, Suite 500

Denver, CO 80203

Telephone: (303) 837-0757

rlitvak@familyatty.com and cleathers@familyatty.com

INTERNATIONAL CHILD ABDUCTIONS

I. Hague Convention on the Civil Aspects of International Child Abduction

The Fourteenth Session of the Convention on private international law adopted the Convention on the Civil Aspects of International Child Abduction done at The Hague, Netherlands, on October 25, 1980. The Convention became effective in the United States on July 1, 1988. Currently, 80 countries are signatories to this Convention; of those, 68 countries are recognized by the United States. See http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html. The official reporter for this Convention, Elisa Pérez-Vera, provided a report, which has been utilized by courts as the official commentary of the Hague Convention on the Civil Aspects of International Child Abduction. See Elisa Pérez-Vera, Explanatory Report by Elisa Pérez-Vera, referred to herein as Pérez-Vera Report, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10,494 (Mar. 26, 1986) (Official commentary of the Hague Convention).

The objects of the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter “Convention”) are to “secure the prompt return of children wrongfully removed” from their country of habitual residence, and “ensure the rights of custody and of access under the law of one contracting state are effectively respected.” Convention, Article 1.

II. International Child Abduction Remedies Act (“ICARA”): 42 U.S.C. §11601 et seq.

The International Child Abduction Remedies Act was passed in 1988 to implement the Hague Convention on the Civil Aspects of International Child Abduction in the United States. International Child Abduction Remedies Act, Public Law 100-300 at 42 U.S.C. §11601 et seq.

The provisions of ICARA permit the Courts of the United States to determine only the rights under the Convention and not the merits of an underlying child custody matter. See also 42 U.S.C. §11601(b)(4); Convention, Article 19; Pérez-Vera Report, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10,494 (Mar. 26, 1986) (comment 19).

III. Filing a Case Pursuant to ICARA

First, the Petitioner (the non-abducting parent) notifies the Central Authority in the country of habitual residence or the Central Authority of the country to which the children were brought. Implementing the Convention, ICARA only applies when a child is taken to another country party to the Convention. De Silva v. Pitts, 481 F.3d 1279 (10th Cir. 2007) (no remedy under ICARA when

child retained in non-signatory country Sri Lanka). In the United States, the U.S. Department of State, Office of Children's Issues, is the Central Authority. Until April 1, 2008, the Department of State had contracted the role of Central Authority to the National Center for Missing and Exploited Children.

Petitioner must demonstrate by a preponderance of the evidence that a child was wrongfully removed from their country of habitual residence, in breach of rights of custody. 42 U.S.C. §11603(e)(1)(A). Once the court determines that the child has been wrongfully removed, and a period of less than one year has passed since the wrongful removal, the court shall order the return of the child forthwith. Convention, Article 12.

The elements that a Petitioner must establish are:

a. **What is a Child?**

ICARA and the Convention apply to children under the age of sixteen (16). Convention, Article 4.

b. **What is a Wrongful Removal or Retention?**

A removal is wrongful where it is in breach of "rights of custody" attributed to a person under the law of the state in which the child was habitually residing immediately before the removal, and at the time of the removal, those rights of custody were actually being exercised. 42 U.S.C. §11603(e); Convention, Article 3. Wrongful removal also includes "removal...before the entry of a custody order regarding that child." 42 U.S.C. §11603(f)(2).

c. **What are Rights of Custody and Rights of Access?**

"Rights of Custody" may arise by operation of law, by judicial decision, or by reason of an enforceable agreement. Convention, Article 3. The Convention intends to protect all ways in which custody rights may be exercised. Pérez-Vera Report, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10,494 (Mar. 26, 1986) (Comment 71). Custody rights include rights that relate "to the care of the person of the child." Convention, Article 5(a). Article 5 specifically identifies that custody rights include the "right to determine the child's place of residence." Rights of Custody include numerous rights, therefore "a parent need not have 'custody' of the child to be entitled to return of his child under the convention; rather he need only have one right of custody." Furnes v. Reeves, 362 F.3d 702, 714 (11th Cir. 2004). Rights of Custody may be sole rights or joint rights, since a parent's custody rights are interfered with when a child under joint custody arrangements is

removed from his or her country of habitual residence. Pérez-Vera Report, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10,494 (Mar. 26, 1986) (Comment 84) (Convention was meant to protect joint custody rights). The remedy for interference with a parent's rights of custody is return of the child. Whallon v. Lynn, 230 F.3d 450, 455 (1st Cir. 2000).

"Rights of Access" include the right to take the child for a limited period of time to a place other than the child's habitual residence. Convention, Article 5. Rights of Access are equivalent to parenting time or visitation rights. 42 U.S.C. §11602(7). If Rights of Access are being interfered with due to removal of the child from his or her country of habitual residence, the Petitioner may not seek return of the child. But the Petitioner may file an Application to Organize or Secure the Effective Exercise of Rights of Access, so that under the circumstances, an appropriate visitation schedule may be established. Croll v. Croll, 229 F.3d 133 (2nd Cir. 2000); Convention, Article 21.

When determining a parent's rights of custody or rights of access, the courts in the new country "may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable." Convention, Article 14; Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259, 275 (3rd Cir. 2007) ("it is necessary to examine the country of origin's custody laws to determine whether a party...had custody rights in that country"). Another means of establishing the law of a Contracting State is to request that the Petitioner obtain a determination from the child's country of habitual residence that the child was wrongfully removed or retained. Convention, Article 15. When courts in the new country are interpreting foreign law, the law from the children's habitual place of residence should be viewed in the "widest possible sense." Pérez-Vera Report, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10,494 (Mar. 26, 1986) (Comment 67). Moreover, courts must "avoid imposing American legal concepts onto another legal culture." Whallon, 230 F.3d at 456.

Is a *Ne Exeat* Clause a Right of Custody?

The majority of federal courts have held that a *ne exeat* provision, or a "writ restraining a person from leaving, or removing a child or property from, the jurisdiction," does not bestow custody rights upon a party. Black's Law Dictionary (8th ed. 2004); Croll v. Croll, 229 F.3d 133 (2nd Cir. 2000); Gonzalez v. Gutierrez, 311 F.3d 942 (9th Cir. 2002). These cases held that a *ne exeat* clause is not actually a right to determine the residence of a child, which is a defining custody right under the Convention, Article 5. Rather, a *ne exeat* clause provides only a right to

limit a parent with custody rights from determining where a child may live. Abbott v. Abbott, 495 F.Supp.2d 635 (W.D. Tex., 2007).

A minority of opinions provide that a *ne exeat* clause must be viewed in light of the fact that the Convention applies to “decisions regarding international relocation,” not relocations within the country of habitual residence. Croll, 229 F.3d at 148 (dissent). In Croll, the dissent draws the parallel, that “when a parent takes a child abroad in violation of *ne exeat* rights granted to the other parent by an order from the country of habitual residence, she nullifies that country’s custody law as effectively as does the parent who kidnaps a child in violation of the rights of a parent with physical custody of the child.” Id. at 147. Hence, if courts were to exclude *ne exeat* clauses from custody rights, a parent could relocate to another country and seek to legitimize the wrongful removal action that the home country attempted to prevent with the inclusion of the *ne exeat* clause. Id. This action would undermine the underlying purpose of the Convention. Following this reasoning, a *ne exeat* provision ultimately gives a parent a veto power regarding an international relocation, which may be viewed as a form of decision-making authority. A limited number of cases have found that a veto power against an international relocation is a custody right “relating to the care of the person of a child.” Furnes v. Reeves, 362 F.3d 702, 716 (11th Cir. 2004); Convention Article 5. In furtherance of explaining this type of custody right, if a parent is able to veto an international relocation, that parent not only prevents a wrongful removal, but alternatively ensures that the child will remain in his or her country of habitual residence, and will learn the customs, culture and language of that country. Furnes, 362 F.3d at 716.

c. What is Habitual Residence?

The Convention applies to children who were habitual residents of a contracting state immediately before they were removed in violation of rights of custody or access rights. Convention, Article 4.

IV. Defenses to a Petition filed under ICARA

There are exceptions to the automatic return of the children to their country of habitual residence despite a finding of wrongful removal or retention. The exceptions are to be narrowly construed due the Convention’s “strong presumption favoring return of a wrongfully removed child.” Danaipour v. McLarey, 286 F.3d 1, 13 (1st Cir. 2002); also Friedrich v. Friedrich, a.k.a. Friedrich II, 78 F.3d 1060, 1067 (6th Cir. 1996); Pérez-Vera Report, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10,494 (Mar. 26, 1986) (comment 34). Though an exception may exist, the court has discretion to order the return the child regardless, if the return would promote the aims

of the Convention. De Silva v. Pitts, 481 F.3d 1279, 1285 (10th Cir. 2007); Convention, Article 18.

a. **Grave Risk of Physical or Psychological Harm**

Respondent must establish, by clear and convincing evidence, that there is a “grave risk” that returning the child would expose him or her to physical or psychological harm, or would “otherwise place the child in an intolerable situation.” 42 U.S.C. 11603(e)(2)(A); Convention, Article 13(b). The risk must be grave, not merely serious. Simcox v. Simcox, 511 F.3d 594, 605 (6th Cir. 2007). Case law has categorized a grave risk of physical or psychological harm, or an intolerable situation, to only exist in extremely limited circumstances. Specifically, such a risk would exist if the children were to be returned to a zone of war, famine or disease, or if there was documented evidence that the child was seriously abused or neglected by the parent seeking their return. Silverman v. Silverman, 338 F.3d 886, 900 (8th Cir. 2003). A grave risk or an intolerable situation does not exist merely because the children are used to living in the new country and may have adjustment problems upon return, or that money was in short supply in their home country, or that educational or other opportunities were limited. Friedrich v. Friedrich, a.k.a. Friedrich II, 78 F.3d 1060, 1068-69 (6th Cir. 1996); In re: Application of Adan, 437 F.3d 381, 395 (3rd Cir. 2006). The argument that the “best interests” of the child would not be aided by the child’s return back to the country of habitual residence is not applicable in ICARA cases. Danaipour v. McLarey, 286 F.3d 1, 14 (1st Cir. 2002).

Do
Undertakings
interfere with
the prompt
Return of the
Child?

Some courts have included undertakings, or “enforceable conditions of return designed to mitigate the risk of harm,” within its orders for return of the child. Simcox, 511 F.3d at 605. The notion of undertakings is a judicial invention, and not contained within the Convention or ICARA. Danaipour, 286 F.3d at 21. Courts are divided as to whether undertakings should be utilized. Some courts support undertakings because they provide safeguards while the court in the country of habitual residence determines the underlying custody matter, and may mitigate short-term harm if children are to be returned. Danaipour, 286 F.3d at 21-22. Other courts are wary of undertakings because they may be unenforceable in the country of habitual residence, may cross the line into determining the merits of the underlying custody dispute or introducing a “best interests” standard not found in ICARA, may reward the abducting parent, may undermine the Convention’s objective of forthwith return of the child, or may be insufficient to ensure the safety of the child. Simcox, 511 F.3d at 607-08. The Department of State recommends:

limited use of undertakings where they: (1) are appropriate in scope; (2) facilitate the Article 12 objective of return of the child

“forthwith;” (3) help to minimize the issuance of non-return orders based upon Article 13; and (4) respect the jurisdictional nature of the Convention by not encroaching on substantive issues relating to custody and maintenance properly left to the court of the habitual residence.”

Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, (April 2007), at http://travel.state.gov/pdf/child_abduction_Compliance_Report.pdf.

b. **Not Exercising Custody Rights**

Respondent must establish, by a preponderance of the evidence, that the Petitioner was not actually exercising his or her custody rights at the time of the removal of the children from their country of habitual residence, or that the Petitioner consented or acquiesced in the removal of the children. Ohlander v. Larson, 114 F.3d 1531 (10th Cir. 1997); Convention, Article 13(a). The Petitioner, on the other hand, “cannot fail to exercise [his or her] custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child.” Bader v. Kramer, 484 F.3d 666, 671 (4th Cir. 2007).

c. **Wishes of the Child**

If the court finds, by a preponderance of the evidence, that the child “has attained an age and degree of maturity” to offer an opinion, the court may consider that opinion and may refuse to order the return of the child. 42 U.S.C. §11603(e)(2)(B); Convention, Article 13. Neither the Convention nor ICARA has established a minimum age at which a child’s opinion may be heard. In fact, case law has not provided a minimum age, nor a consistent pattern for establishing whether a child possesses the age or maturity for his or her opinion to be recognized. See generally Locicero v. Lurashi, 321 F.Supp.2d 295 (D.P.R. 2004) (thirteen-year-old’s preference was not enough to disregard the narrowness of the age and maturity exception); Blondin v. Dubois, 238 F.3d 153 (2nd Cir. 2001) (eight-year-old views were “remarkably mature” when reporting the abuse she suffered). Generally, the judge will meet with a child in chambers to determine whether the child is mature enough to express his or her opinion. See also Pérez-Vera Report, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10,494 (Mar. 26, 1986) (comment 30). If the Judge is able to determine that a child’s opinion is the product of the abducting parent’s undue influence, then the court need not put as much weight upon the child’s wishes. In re the Application of Robinson, 983 F.Supp. 1339 (D. Colo. 1997) (eleven-year-old child’s opinion not considered because the Court found the child was unduly influenced by abducting parent and therapist).

d. Time in New Country

Respondent must demonstrate, by a preponderance of the evidence, that the children have been in the new country for a period of over one year, measured from the date the children were removed from their country of habitual residence to the date of filing of the Petition, and that the children are now settled in their new environment. Ohlander v. Larson, 114 F.3d 1531 (10th Cir. 1997); 42 U.S.C. §11603(e)(2)(B); Convention, Article 12.

e. Human Rights and Fundamental Freedoms

The final exception is rarely utilized. Under this exception, the court does not need to return the child if return would not be permitted by the “fundamental principles...relating to the protection of human rights and fundamental freedoms.” Convention, Article 20; 42 USC §11603(e)(2)(B). The Respondent must establish this by clear and convincing evidence.

V. Jurisdiction-Where to File an ICARA Petition?

In the United States of America, both the state courts and the federal district courts have concurrent original jurisdiction over actions arising under the Convention. 42 U.S.C. §11603(a).

VI. Prevention of Forum Shopping

The Convention and ICARA prevent parents from abducting children in order to flee a court order that they do not believe is favorable, or to attempt to find a court that may be more sympathetic to their position. Shealy v. Shealy, 295 F.3d 1117 (10th Cir. 2002); see also Pérez-Vera Report, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10,494 (Mar. 26, 1986) (comment 34).

VII. Timeframe for an ICARA case

Petitions filed under ICARA and the Convention are meant to be expedited proceedings; they should be resolved within six weeks of filing the Petition. Convention, Article 11. If the court does not deliver an opinion within six weeks, the Petitioner or the Central Authority in the country of habitual residence may request the Central Authority of the country where the children have been brought, send a letter to the court inquiring as to the reason for the delay.

VIII. Costs involved when filing an ICARA Petition

The costs of legal proceedings, travel expenses to and from another country, and costs associated with returning a child to his or her country of habitual residence may be great. If the court orders the return of the child, the court shall order the person who wrongfully removed the child to pay necessary expenses incurred by Petitioner, or incurred on his or her behalf. 42 U.S.C. §11607. These expenses include travel expenses, costs incurred in locating the child, attorney fees and the costs associated with returning the child. (Pursuant to Hague Convention Article 26, the court has discretion with regard to costs, and may order these reimbursements.)

IX. Uniform Child Abduction Prevention Act (hereinafter the “Act”)

Parental Kidnapping Prevention Act (1980) recognizes child-custody orders from other states.

This entire article was adopted by the Colorado legislature in 2007 and is effective for petitions filed on May 14, 2007 or after. The purpose of the Act is “to deter both predecree and postdecree domestic and international child abductions by parents, persons acting on behalf of a parent or others.” Prefatory Note. This act does not supercede the Uniform Child-Custody Jurisdiction Act (“UCCJA”) or the Uniform Child-Custody Jurisdiction and Enforcement Act (“UCCJEA”). Prefatory Note. In fact, the Act utilizes many of the definitions and concepts present in the UCCJEA. See comments to C.R.S. §14-13.5-102. Practitioners should take from the Act that preventative measures can be effectuated with awareness of abduction risk factors, and by drafting more specific parenting plans, thus evidencing the intent of the parties and improving the enforceability of the agreement.

a. **Who does the Act apply to?**

This Act applies to children less than eighteen years old. C.R.S. §14-13.5-102. The Act applies not only to the parents of children under eighteen years old, but also to individuals who are in a caregiver role with the children. Prefatory Note. The Act applies to child-custody determinations, a term which is defined very broadly to include legal custody, physical custody, allocation of parental responsibilities, visitation, and parenting time. C.R.S. §14-13.5-102.

b. **Actions under Uniform Child Abduction Prevention Act**

The court on its own motion, may order abduction prevention measures in a child-custody proceeding if there is evidence of “a credible risk of abduction of the child.” C.R.S. §14-13.5-104. Additionally, a party to a child-custody determination or a party having the right to seek custody, including the Department of Human Services, may file a verified petition identifying the specific risk factors for abduction and seeking abduction

prevention measures from the court to protect the child. C.R.S. §14-13.5-104; C.R.S. §14-13.5-106.

The courts of Colorado have jurisdiction over these matters if the same court would have jurisdiction to make a child-custody determination according to the UCCJEA. C.R.S. §14-13.5-105. A child-custody determination includes an initial determination, modification of an existing order, or jurisdiction to address a temporary emergency, including threatened mistreatment or abuse under the UCCJEA.

c. Factors to Determine the Credible Risk of Abduction of a Child

There are numerous pieces of evidence that the court may consider when determining if a credible risk of abduction of a child exists. The court may consider, among other things, whether either party has abducted, attempted to abduct, or threatened to abduct the child; has demonstrated behaviors that suggest a planned abduction such as abandoning employment or a residence, closing bank accounts, applying for travel documents, seeking the child's birth certificate or school records; has engaged in domestic violence or child abuse; lacks strong ties to the United States of America while maintaining strong ties with a foreign country; evidence that he or she may take the child to a country that is not a party to the Convention; immigration or citizenship denials; or forged government forms. See generally C.R.S. §14-13.5-107.

d. Remedies under UCAPA

If the court finds a credible risk of abduction, the court shall enter an abduction prevention order. C.R.S. §14-13.5-108. The Act provides provisions that must be included in an abduction prevention order, including a basis for jurisdiction, an explanation of notice and opportunity to be heard, a detailed description of decision-making and parenting time, identification of the child's habitual residence, and a statement that violation of the order may result in civil and criminal penalties. C.R.S. §14-13.5-108(1). It is this specificity and uniformity among courts that will aid in enforcement of the order. An abduction prevention order may include travel restrictions, including prohibitions against leaving the country, or removing the children from school; or restrictions regarding the child's passport, including requirements to register the child in the Children's Passport Issuance Alert Program; or prerequisites for exercising parenting time, including posting of a bond to serve as a financial deterrent to abduction, or supervised parenting time. C.R.S. §14-13.5-108(3).

In addition to the abduction prevention order, a Petitioner may seek an *ex parte* warrant permitting law enforcement to take physical custody of the





























child immediately. C.R.S. §14-13.5-109. An *ex parte* warrant is a proper remedy if the court finds that there is a credible risk that the child is likely to be wrongfully removed imminently. C.R.S. §14-13.5-109. This remedy does not apply to wrongful retention of children. Respondent shall be permitted a hearing the first judicial day possible after the *ex parte* warrant is executed. C.R.S. §14-13.5-109(2). At the hearing, Respondent may demonstrate that it was Respondent's good faith belief that his or her wrongful removal conduct was "necessary to avoid imminent harm to the child." C.R.S. §14-13.5-107(2). If the court determines that the Petitioner sought the *ex parte* warrant in bad faith, or for harassment purposes, the court may award attorney fees and costs to the Respondent. C.R.S. §14-13.5-109(7).




































e. **Others Prevention Remedies**







The Department of State is able to work with local law enforcement to prevent abductions from the United States. Additionally, the State Department may enlist Convention partners and their law enforcement officials in order to intercept an ongoing abduction. In 2003, the Central Authority created a unit to specialize in preventing international parental child abductions. The Children's Passport Issuance Alert Program enables parents to register their child so that parents will be notified in anyone applies for a new or replacement passport for the child. If a parent objects to a passport issuance, all U.S. passport agencies, U.S. embassies and U.S. consulates are notified of the child's travel restrictions.

Hague Abduction Convention Country List

1980 Hague Convention on the Civil Aspects of International Child Abduction

Convention Partners – The dates of entry into force with the United States:	
 Argentina	06/01/91
 Australia	07/01/88
 Austria	10/01/88
 Bahamas, The	01/01/94
 Belgium	05/01/99
 Belize	11/01/89
 Bosnia and Herzegovina	12/01/91
 Brazil	12/01/03
 Bulgaria	01/01/05
 Burkina Faso	11/01/92
 Canada	07/01/88
 Chile	07/01/94
 China – <i>(Hong Kong and Macau only)</i>	
Hong Kong	09/01/97
Macau	03/01/99
 Colombia	06/01/96
 Costa Rica	01/01/08
 Croatia	12/01/99
Cyprus	03/01/95
 Czech Republic	03/01/98
 Denmark	07/01/91
 Dominican Republic	06/01/07
 Ecuador	04/01/92
 El Salvador	06/01/07
 Estonia	05/01/07
 Finland	08/01/94
 France	07/01/88
 Germany	12/01/90
 Greece	06/01/93
 Guatemala	01/01/08
 Honduras	06/01/94

 Hungary	07/01/88
 Iceland	12/01/96
 Ireland	10/01/91
 Israel	12/01/91
 Italy	05/01/95
 Latvia	05/01/07
 Lithuania	05/01/07
 Luxembourg	07/01/88
 Macedonia, Republic of	12/01/91
 Malta	02/01/03
 Mauritius	10/01/93
 Mexico	10/01/91
 Monaco	06/01/93
 Montenegro	12/01/91
 Netherlands	09/01/91
 New Zealand	10/01/91
 Norway	04/01/89
 Panama	06/01/94
 Paraguay	01/01/08
 Peru	06/01/07
 Poland	11/01/92
 Portugal	07/01/98
 Romania	06/01/93
 Saint Kitts and Nevis	06/01/95
 San Marino	01/01/08
 Serbia	12/01/91
 Slovakia	02/01/01
 Slovenia	04/01/95
 South Africa	11/01/97
 Spain	07/01/88
 Sri Lanka	01/01/08
 Sweden	06/01/89
 Switzerland	07/01/88
 Turkey	08/01/00
 Ukraine	09/01/07

 United Kingdom	07/01/88
 Bermuda	03/01/99
 Cayman Islands	08/01/88
 Uruguay	09/01/04
 Venezuela	01/01/97
 Zimbabwe	08/01/95