

EBOOK

CHILD RELOCATION AND ABDUCTION

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Child Relocation and Abduction

CHILD ABDUCTION

The Hague Convention on Civil Aspects of International Child Abduction

South Africa is a party state of the Hague Convention on Civil Aspects of International Child Abduction, an international treaty aimed at preventing the removal of a child from the jurisdiction in which he/she normally resides by a parent or caregiver without the consent of the other parent or caregiver and to facilitate the return of the child wrongfully removed. South Africa ratified the Convention in 1996 and it came into operation on 1 October 1997.

The purpose of the Convention is to secure the prompt return of any child wrongfully removed to or retained in a contracting state. The Convention binds member states to assist the parent or person left behind. By providing a simplified procedure and additional remedies to those seeking the return of a child who has been wrongfully removed or retained, the convention aims to curb international abductions of children.

The purpose of a speedy return is to place the child in the jurisdiction of a court that is better appraised to deal with the merits of the parental dispute. A child removed from one parent and taken to another country is subjected to the concentrated influence of the custodial parent; time favours the abductor. Unless firm steps are taken to ensure the prompt implementation of the Convention procedures, in a prolonged separation, the 'absent' parent's influence on the child will wane. In addition, this parent will be at a considerable disadvantage in litigating a contested claim for custody and access in the courts of a country other than those of the place of habitual residence (the country from which the child has been removed). Few people can readily afford litigation in their own jurisdiction, let alone in foreign courts, where the legal system may be different, laws and even language unfamiliar, costs substantial, and facilities for legal assistance difficult to obtain or non-existent.

Most European and Commonwealth countries, as well as the US, are members. On the African continent, only South Africa, Mauritius and Zimbabwe subscribe to the Convention. When a child is removed to a country that is not a party state to the Convention, the South African High Court, as the upper guardian of minor children, will have jurisdiction and the application should be made to such a court for the return of the child.

The Convention only applies to wrongful removals/retentions occurring after the treaty became effective between the involved countries.

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Wrongful removal or retention of a child

The removal or retention of a child is to be considered wrongful:

- where it is in breach of the rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and
- where, at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned above may arise in particular by operation of law, by reason of judicial or administrative order, or by reason of an agreement having legal effect under the law of that state. The Convention applies to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights.

Where a child has been wrongfully removed or retained and, at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the child's immediate return.

In practice, applications are generally heard on an urgent or semi-urgent basis by way of notice of motion proceedings. Inevitably, the overriding principle that our courts refer to is the best interest of the child principle.

In South African law, the right to consent to or refuse the removal of a child from South Africa is entrenched in the concept of guardianship. In terms of the Children's Act, 38 of 2005, a person who has parental responsibilities and rights in respect of a child has the right to act as guardian of the child, and a guardian must consent to the child's departure or removal from South Africa. Where more than one person has guardianship over a child, all must consent before the child can be removed.

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The role of the Central Authority

A contracting state is bound to set up an administrative body known as a Central Authority, whose duty it is to trace the child and take steps to secure the child's return. In South Africa, the Chief Family Advocate is designated as Central Authority.

The Central Authority assists in both 'outgoing' cases (when a child has been wrongfully taken from South Africa to a foreign country or retained in a foreign country), and 'incoming' cases (when a child has been wrongfully brought to, or retained in, South Africa).

An application for the return of or access to a child must be submitted to the Central Authority.

Habitual residence

This concept of 'habitual residence' is not defined by the Convention itself. This is to avoid the development of restrictive rules as to the meaning of habitual residence, so that the facts and circumstances of each case can be assessed free of suppositions and presumptions. This means that close attention must be paid to subjective intent when evaluating an individual's habitual residence.

When a child is removed from its habitual environment, the implication is that it has been removed from the family and social environment in which it developed. The word 'habitual' implies a stable territorial link, which may be achieved through length of stay, or through a particularly close tie between the child and the place.

A number of foreign judgments have established that a possible prerequisite for habitual residence is some 'degree of settled purpose or intention'. A settled purpose or settled intention will clearly not be temporary.

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Procedures

The Office of the Chief Family Advocate divides the applications into incoming and outgoing applications. Courts and administrative authorities should act quickly when applications are brought before them, but if a decision has not been made within six weeks from the date proceedings commenced, the applicant or the Central Authority of the requested state may officially request a reason for the delay.

The Convention aims to ensure that a competent court in the country of habitual residence decides on the merits of custody, access and even permanent removal to another country.

This is based on the premise that courts in the country of habitual residence are better apprised to obtain all relevant evidence regarding the merits of custody, care and contact, and are in a better position to grant an order that will be in the best interests of and/or least detrimental to the welfare of the child.

For this reason, the Convention is consistent with our applicable laws and Constitution, through affording the best interests of the child paramount importance.

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Outgoing

The return of a child to South Africa

1. The applicant must complete a Hague application form with supporting documents such as copies of birth certificates, divorce orders (if applicable), photographs of the abductor and children, etc. There should also be a short affidavit from the applicant setting out the background to the application.
2. The delegated Central Authority will then attach an account of the relevant law of the country governing the issues raised and certify that the application falls within the ambit of the Hague Convention.
3. The application form is then sent to the requested state and the delegated Central Authority liaises with the Central Authority in the requested state.
4. All correspondence is copied to the Chief Family Advocate and regular progress reports are sent to his/her office.
5. The delegated Central Authority must submit background social worker reports on the applicant's circumstances to the foreign Central Authority if so requested.
6. The delegated Central Authority must keep the left-behind parent informed of developments and steer the process until the application is decided.

If the child has been taken to a contracting country and the application is accepted, the South African Central Authority will compile a dossier and forward the application to the foreign Central Authority, requesting prompt return of the child. All central authorities are required by the Convention to take steps to obtain the voluntary return of the child. This is done through cross-border mediation. Litigation is resorted to in the event that the mediation fails. This approach is also consistent with the general principles set out in the Children's Act, namely, that in any matter concerning a child, 'an approach which is conducive to conciliation and problem-solving should be followed'. It is, however, important that the left-behind parent alert the Central Authority to the possibility of further movement/possible harm to the child, should the abducting parent know of the application for return. In such cases, the Central Authority will take steps to obtain an urgent court order to prevent further movement of or possible harm to the child.

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Incoming

The return of a child from South Africa

1. A demand is received from another contracting state for the return of the child or for contact with the child by the left-behind parent.
 2. The Chief Family Advocate then delegates the obligations to a family advocate in the province in which the child is thought to be.
 3. In terms of the Convention, the family advocate initially attempts to mediate a voluntary return of the child or a voluntary agreement on access. In this part of the procedure, the family advocate who is the delegated Central Authority appoints another family advocate and family counsellor to assist him/her to mediate the return or agreement on contact.
 4. The delegated Central Authority may have to engage the services of a tracing agent to find the child. In practice, maintenance investigators, social workers, family finders and members of the South African Police Service (SAPS) will assist in this task.
 5. The delegated Central Authority may have to bring an urgent application to seize the passports or travel documents of the child and the abductor. This is done when there is evidence that the abductor is a 'flight risk'. In some extreme instances, the child may have to be temporarily removed from the care of a party and placed in a place of safety until the application is decided.
 6. If the attempt to mediate a voluntary return or contact fails, then litigation ensues. The State Attorney assists the delegated Central Authority to bring an application in the High Court.
 7. The delegated Central Authority interacts with the foreign Central Authority at all stages and drives the process until the child is returned or a contact order is put in place.
 8. The delegated Central Authority must consider the practical arrangements for the return of the child, for example who will pay for air ticket(s) and who will accompany the child. In practice, the abductor usually returns with the child. There may be undertakings made regarding the payment of interim maintenance and the withdrawal of warrants of arrest for the abductor. These may be incorporated into the court order or be arranged by the corresponding Central Authority. The court order could also call for 'mirror orders' to be made in the requesting state.
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Opposing an application for return

If a child has been wrongfully removed for less than one year, the child's removal is to be ordered forthwith under the Convention. The Convention makes it mandatory for the judicial authority to order return. However, the Convention does make provision for the abducting parent to oppose the application for the return of the child, and the court has discretion to order or refuse the return based on the evidence brought before it.

When there is a grave risk that returning the child will expose him/her to physical or psychological harm, or would place him/her in an intolerable situation, the court hearing the application is not bound to order the child's return. Mere allegations of grave risk will not persuade a court to refuse the return, however; it must be shown that the risk is serious or that the envisaged harm is of significant proportion.

Among the most popular defences raised in return applications is that the child objects to the return. In such instances, an assessment must be made, usually with the assistance of a family counsellor or psychologist, to ascertain whether the child possesses sufficient maturity to form a viewpoint that the court may consider. The child's reasons for objecting will also be examined in order to exclude possible influence by the abducting parent.

Other available defences are that the removal was not wrongful, that the left-behind parent was not exercising his/her parental rights at the time of removal, or that the left-behind parent had agreed or subsequently acquiesced to the removal.

If the child has been wrongfully removed for more than one year, and available evidence indicates that the child has become settled in the new environment, the court may not necessarily order a return. In cases where the child's return would be contrary to South Africa's fundamental freedoms and principles relating to the protection of human rights, the courts are under no obligation to order the child's return.

A court may also withhold permission to return the child if he/she is above 16 years of age and therefore not covered by the Convention.

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Care and contact rulings made in South African civil courts

An order granting care and contact can be used as proof of the existence of parental rights by the parent seeking the return of the abducted child. Where an abductor seeks an order in the South African court that will have the effect of ratifying the wrongfulness of the child's removal to or retention in South Africa, the Central Authority will invoke the Convention to stop or suspend the proceedings until a decision has been made on the return of the child to his/her country of habitual residence.

The judicial authorities/courts of a contracting state to which a child has been taken or retained in are required by the Convention to not decide on the merits of custody rights until a determination has been made that the child will not be returned.

Recovering a child from a non-contracting state

From a South African perspective, it is advisable that the left-behind parent obtain an order through the normal civil procedures, which declare the removal/retention of the child unlawful and a breach of their parental rights. Once such an order has been obtained, the left-behind parent must obtain a mirror order or an order for enforcement in the foreign jurisdiction that also orders the return of the child.

This route is very expensive as it involves the instruction of lawyers in foreign countries. For this reason, the Hague Conference on Private International Law is taking steps to encourage other countries to consider contracting under the Convention.