

Jurisdiction issues in child abduction cases

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Family analysis: A Mexican mother's application for the return of her child under the Hague Convention on Child Abduction has been dismissed by the High Court. David Williams, barrister at 4 Paper Buildings, explains why this hearing offers family lawyers vital guidance in approaching child abduction cases and how the court will apply Hague Convention policy.

Original news

Hunt v Hunt [2012] All ER (D) 217 (Oct)

The Family Division considered proceedings issued by the mother under the Hague Convention on the Civil Aspects of International Child Abduction alleging wrongful retention of the child or otherwise seeking summary return to Mexico.

The court found that an agreement ostensibly reached between the parties in the Mexican court had not acted as retrospective consent to fix the child's habitual residence in Mexico. Accordingly, the Convention proceedings were on the basis of the child's habitual residence in the UK.

What key issues did this case raise?

This is somewhat of a unique case, turning on its own facts, but in terms of providing guidance in abduction cases, it emphasises the importance of issuing proceedings in England as quickly as possible.

In essence, the judge held that the mother could not establish a habitual place of residence in Mexico. She had effectively been on the run, in hiding and avoiding the authorities. There was no regularity to her presence or any evidence of integration or settlement and as such it prevented her from acquiring habitual residence in the country.

A key point to note is that by issuing wardship proceedings in England, the father conferred rights of custody onto the court and thus prevented any consent he may have given to any custodial arrangements he made in Mexico remaining effective. The duress arguments put forward by the mother were circumvented by the fact that it was down to the English court to give its consent to the child continuing to live in Mexico.

To what extent is the judgment helpful in clarifying the law?

This judgment is a good example of the court using pre-existing proceedings and orders effectively to counter arguments to do with habitual residence or consent or anything else which might result in a transfer of jurisdiction to another country.

What practical guidance can you offer lawyers in Hague Convention cases?

The main take-away point for practitioners is the speed of reaction needed if it appears as though abduction has taken place or if there is the risk of one occurring, even if the child is out of the country. Proceedings should be issued to fix the jurisdiction of the English court as quickly as possible so it can determine its own jurisdiction before the court seised second does.

Secondly, practitioners should use the wardship jurisdiction rather than relying on the Children Act 1989. If the father had issued Children Act proceedings, the court would have had no custodial rights (although the court might acquire 'rights of custody' for the purposes of the 1980 Hague Convention when Children Act 1989 proceedings are issued) over the child; any custodial agreements would have been the responsibility of him and the mother and he would have faced a much harder argument over the transfer of jurisdiction to Mexico.

Wardship jurisdiction is generally useful in some cases, especially if the aim is for the strongest possible protection of the child. If a judge is questioning why wardship is helpful, practitioners should look to this case for assistance.

Are there any unresolved issues practitioners need to watch out for?

The judge had real concerns about the ability of the Mexican legal system to provide a level playing field. The basis of non-return under art 13(b) of the Hague Convention was, effectively, that it would have been nigh on impossible for Mr Hunt to litigate sensibly in Mexico. This highlights the level of evidence one needs in a case where the litigant relies on the 'grave risk of harm' exemption under art 13(b) and argues that they will not get a fair hearing in the requesting state. What had happened in Mexico was almost unique in terms of the mother's litigation and delay strategy.

How does this case fit in with other developments in this area?

Hunt v Hunt is a stark example of the court applying the policy of the Hague Convention. The message seems to be that the worse the abduction appears, the harder the court will work to uphold the rights of the left-behind parent and the child. This approach may be slightly out of kilter with the way that Convention case law is going, but this is an exceptional case on its facts concerning a blatant and prolonged abduction. It is perhaps more consistent with the position that the English courts were taking a few years ago rather than the current more relaxed, child welfare-focused approach.

I would not be surprised if this case went to appeal, particularly as the Mexican government is involved. This is almost the only example of the government of the requesting state becoming involved in proceedings. Even if the outcome is reversed the essential message of the decision of the court in the instant case won't be affected should an appeal be allowed.

Interviewed by Duncan Wood.

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