



UN The Hague Convention and International Child abduction

Over the past ten years, more South Africans became married but both the marriage and the divorce rates have fluctuated, according to Statistics South Africa figures released in August 2008.

The body said a total of 184 860 marriages were registered in South Africa in 2006 - the latest available figures - an increase of 26 percent from 10 years ago.

Of the marriages which ended in divorce, Statistics South Africa found:

- Close to 60 percent of divorces involved children and
- A total of 30 242 children were affected by divorce in 2006.

As the country and economy change, many parents are working abroad, some of whom leave children behind, while others emigrate with their dependents. Divorced / separated parents come to care and visitation agreements in this regard, when matters are dealt with amicably. However in other cases,

parents do not see eye to eye and one will flee the country with the child. In some instances parents resort to self-help by relocating children to a jurisdiction where they hope for a favourable outcome in either divorce, care or contact proceedings.

These are cases of Parental Abduction. Because of different laws, cultural views and perceptions of men's and women's role in society, Parental Abduction cases are challenging.



THE CENTRAL AUTHORITY SOUTH AFRICA

The Hague Convention of the Civil Aspects of International Child Abduction

Many countries have adopted the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

By doing so, those countries have incurred certain obligations, similar to that arising out of a contract.

This is a treaty designed to expedite the return of children back to their country of habitual residence, in cases where they have been wrongfully removed.

Habitual residence sometimes differs /or from citizenship and nationality.

The Convention is not only about return, but through Article 21 also makes provision for contact, removal of obstacles that may prevent effective exercise of parent-child contact. Central Authorities are duty-bound as with return applications to perform duties emanating from Article 21.

The Hague Convention aims to curb international abductions of children by providing judicial remedies to those seeking the return of a child who has been wrongfully removed or retained. It provides a simplified procedure for seeking the return of a child to his/her country

of habitual residence. It should be noted that purpose of the speedy return is to place the child in the jurisdiction of a court that is best apprised to deal with the merits of the parental dispute.

As a matter of fact, the child can remain in the care of the abducting parent, if they choose to return together with the child.

The elements of a cause of action for the return of an abducted child under the Hague Convention on the civil aspects of child abduction and International Child Abduction Remedies Act are that:

1. child was habitually resident of the country from which the child was abducted;

2. petitioning parent had either sole or joint rights of custody of the child either through a custody order or de jure (by operation of law), and

3. at the time of removal, petitioning parent was exercising those rights.

Chief Family Advocate Petunia Seabi is an expert on such matters. She explains how South African law deals with cases of Parental Abduction, using the Hague Convention and the Children's Act as points of departure.



Chief Family Advocate Petunia Seabi.

1. Q: What can South African parents do when a former spouse has abducted a child and taken them abroad?

The left behind parent should try as much as possible to establish the details of the departure and destination of the abducting parent and/or the child. The Hague Convention gives the left behind parent the option of approaching the office of the designated Central Authority for the RSA, which is the office of the Chief Family Advocate or the Central Authority of the country where the child has been abducted to. The abducted child must be below sixteen years of age. In order to facilitate the processing of the application in the OCFA, the left behind parent furnish the following documents:

- Original/certified copies of setting out custody/guardianship rights. Examples of these are marriage certificate, court orders granting the alleged rights, unabridged birth certificates, etc.
- Recent photographs of the abductor and the child
- A sworn statement setting out the facts and circumstances around the alleged abduction
- Copies of pleadings filed in pending litigation in RSA courts, where applicable

The left behind parent will also be required to complete a prescribed form which is used by central authorities in most of the contracting countries.

2. Q: What are the steps taken in recovering an abducted child, in terms of the Hague Convention and SA Children's Act?

The RSA Central Authority immediately after receipt of the necessary documents considers the legal aspects of the request as well as the Convention status of the country to which the child has been taken. If the child has been taken to a contracting country and all legalities have been satisfied, the C.A. will compile a bundle and forward the application to the foreign C.A., requesting prompt return of the child. The procedure does not apply where a child has been taken to a non-Convention country.

All C.A.'s are required by the Convention to take steps to obtain

a 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 C.A. will take steps to obtain an urgent court order to prevent further movement of, or possible harm to the child.

3. Q: How does the Hague Convention on the Civil Aspects of International Child Abduction relate to custody rulings made in South African civil courts?

Two scenarios arise in this regard. First, an order granting custody can be used as proof of parental rights by the parent seeking return of their abducted child. Second, is where an abductor seeks an order in the RSA court, which will have an effect of ratifying the wrongfulness of the removal or retention of the child in S.A. In this case the Central Authority will invoke article 16 of the Convention to stop/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 are required by the Convention not decide on the merits of custody rights until a determination has been made that the child will not be returned.

4. Q: There are limitations to the treaty's application, in that the Convention applies only between countries that have adopted it as "Contracting States." What are the procedures for 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, that 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 which also orders 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 this Convention.

5. Q: What are the countries which subscribe to the Hague Convention?

Most European, Commonwealth countries and the USA. In Africa, the RSA, Mauritius and Zimbabwe only. The latter has however not designated a central authority. We need to take urgent steps to encourage the countries with which we share national borders as well as other African states to enter into mutual child protection agreements, given the vast numbers of minor children moving across our respective borders, some even unaccompanied or without any form of adult supervision.

6. Q: If the parent who has taken a child overseas feels that the parent in South Africa is abusive, a danger to the child or cannot provide adequate care; how do they go about defending their actions, in terms the Hague Convention and SA Children’s Act?

The Convention makes provision for the abducting parent to oppose the application for return. Where the abducting parent establishes that there is a grave risk that the return sought will expose the child to physical, psychological harm, or would place the child in intolerable situation, then the court hearing the application is not bound to order return. It should be noted that mere allegations of grave risk will not persuade a court to refuse the return; it must be shown that the risk is a serious or that the envisaged harm is of significant proportion.

7. Q: Are there timeframes that apply under the Hague Convention on the Civil Aspects of International Child Abduction?

Among the most popular defences that have been raised in return applications is that the child objects to the return. In such instances, an assessment must be made, usually through the assistance of a Family Counsellor or psychologist, whether the child possesses sufficient maturity to form a viewpoint that the court



may consider. The child’s reasons for the objection will also be examined in order to exclude possible influence by the abducting parent.

Some of the defences available 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 retention, or that the left behind parent had agreed or subsequently acquiesced to the removal/retention.

Where available evidence indicates that the child has become settled in the new environment the court may not necessarily order a return.

In cases where a child’s return would be contrary to the RSA’s fundamental principles relating to protection of human rights and fundamental freedoms, our courts

are also under no obligation to order return.

A number of them, including:

1. Children who have attained the age of 16 years are not covered by the Convention.
2. 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.
3. If a child has been wrongfully removed for more than one year, the child should still be returned but an exception is allowed -a court may choose not to return the child if there is evidence that the child is settled in his/her new environment. The court has a discretion to order/refuse the return.
4. Courts and administrative authorities should act quickly in such cases but if one has not reached a decision within six weeks from the date proceedings commenced, an applicant or the Central Authority of the requested State may officially request a reason for the delay.
5. The Convention only applies to wrongful removals/retentions occurring after the treaty became effective between the involved countries.
6. Generally, the Convention requires that countries act without delay in child abduction cases that fall within its parameters. It is one of the objectives of the Convention to protect children internationally from the harmful effects of wrongful removal or retention and to establish procedures of ensuring prompt return of children to their country of habitual residence. The aim is to ensure that a competent court in the country of habitual residence decide on the merits of custody, access and even permanent removal to another country.

This is based on the premise that court in the country of habitual residence is better apprised to obtain all relevant evidence regarding the merits of custody, care and contact and 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 Hague Convention is deemed to be consistent with our applicable laws and the Constitution, through affording the best interests of the child paramount importance.

