Defenses to Child Abduction Claims: Hague Convention Defenses

By Michael P. Sampson
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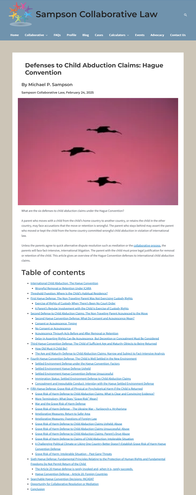

What are the defenses to child abduction claims under the Hague Convention?

A parent who moves with a child from their child's country of habitual residence to another country, or retains the child in the other country, may be liable for child abduction. Yet, the law provides many defenses to the "wrongful" parent who moved or kept the child from the lawful custody and caregiving of the other parent. Defenses to child abduction in violation of the law.

Unless the parents agree to a private alternative dispute resolution such as mediation or the collaborative process, the court will decide custody and parenting time issues. The parents who do not agree to a private alternative will be forced into a litigation process. The court will decide if the parent violated the Hague Convention defenses to international child abduction claims.

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International Child Abduction: The Hague Convention

The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980 (14 I.L.M. 1501), 51 Fed. Reg. 10,494 (1986), reprinted in 51 Fed. Reg. 26,064 (1986) "Hague Convention" Establishes legal procedures and rights of custody and parenting time. The Hague Convention is implemented by the International Child Abduction Remedies Act ("ICARA") to the extent it is the United States implementation the Hague Convention. 42 U.S.C. 11601 et seq., 22 U.S. Code Chapter 9 Convention and Compliance Hague Status

Under ICARA, a person who retains or removes a child in violation of the rights of custody arising under the law of the child's habitual residence, or in violation of a court order, commits a wrongful removal or retention. 42 U.S. C. 11603.

In a return action under ICARA, the court's inquiry, "is limited to the merits of the abduction claim and the merits of the defenses to the abduction claim." Ibid. Ibid. Ibid.

Settled Environment Defense under the Hague Convention: Factors

Various judges were considering the Hague Convention in child abduction claims include:

- The child's age;
- The stability and duration of the child's residence in the new environment;
- Whether the child attended school or day care consistently or irregularly;
- The child's friends, extracurricular activities and relatives in the new location;
- The child's participation in community or religious activities, such as team sports, youth groups, or similar activities;
- The respondent's employment and financial stability, including job security and income stability;
- The child's relationship with family and friends; and
- The immigration status of both parents and the child.

The court appellant cited the Northern District case Ortiz-Barrera v. Dr. Jackelyn Miguel Ruiz, who evaluated if the daughter was well settled in Orlando, was sufficiently mature to express she objected to going back to Peru, and if those objections were based on her maturity.

The judge found daughter was intelligent, even-tempered, and mature to express her feelings clearly, did well in school, had many friends, participated in dance, gymnastics, and church youth groups, and had stable family support.

Trial Judge's Findings: Hereafter Proved The Well Settled Defense

Court recognized the "substantial" evidence of the child's well-being, but "substantial" not "overwhelmed" child's objection, including the strength and stability of Child's residence in Florida. The remaining two factors either favored or were neutral. Mother's immigration status was "not a factor," and Father's immigration status was "not a factor" because he had lawfully resided in Florida and frequently participated in extracurricular activities. The immigration status, both the mother and daughter had permanent resident status, therefore the court found the well settled interruption.

The appeals court upheld the "well settled" defense. Specifically, the court also the section above on the third defense to the Convention, the "grave risk of physical or psychological harm" defense, and stated:

> "Although the trial court did not specifically address the child's objection, the court did find that the child is well settled in her school, friends, and relatives. The trial court also found that the child is mature enough to express her objection, and that she had a strong bond with her father. The trial court's finding that the child is well settled in her school, friends, and relatives, and that the child is mature enough to express her objection, and that she had a strong bond with her father, is not clearly erroneous."

Further Case Reading:

- Ortiz-Barrera v. Dr. Jackelyn Miguel Ruiz, 2016 WL 3126 (S.D. Fla. Jan. 4, 2016), aff'd, 2016 WL 1027 (11th Cir. 2016)
- Alvarez-Hernandez, 2015 WL 1821992 (N.D. Ga. Apr. 20, 2015)
- Hernandez v. Garcia Ortiz, 2015 WL 1821992 (N.D. Ga. Apr. 20, 2015)
- Lozano v. Alvarez, 697 F.3d 41, 51 (1st Cir. 2012)
- Lozano v. Montoya Alvarez, 572 U.S. 1, 134 S. Ct. 1224, 188 L. Ed. 2d 283 (2014)
- Castillo v. Castillo, 434 F. Supp. 2d 1317, 1321 (S.D. Fla. 2006)
- Convention International Child Abduction Cases under the Hague Convention, National Center for Missing & Exploited Children, Criminal Division, U.S. Department of Justice

Settled Environment Defense Under the Hague Convention

The child's age.

The stability and duration of the child's residence in the new environment.

Whether the child attended school or day care consistently or irregularly.

The child's friends, extracurricular activities and relatives in the new location.

The child's participation in community or religious activities, such as team sports, youth groups, or similar activities.

The respondent's employment and financial stability, including job security and income stability.

The child's relationship with family and friends, and

The immigration status of both parents and the child.

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Settled Environment Hague Defense Upheld

Grave risk, but child "mature" enough to express her objection, and strong bond with her father, and child's friends, relatives, and school, "well settled" in Florida, and "well settled" defense upheld.

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Dr La Rosa v. Alonso

Citation: Dr. La Rosa v. Alonso, Case No. 6:21-bkm-00001-KSJ, Tenn. Jan. 28, 2021.

Court denied mother's petition for return of child to her habitual residence, Mexico, from Texas. The child, who was age 14 by the final hearing and "mature," testified that she was well settled in her school, community, and extracurricular activities, and her mother's immediate return would "uproot her life." Court also found that the child's "strong" objection to return to Mexico was "sufficiently confirmed with over the past two years."

Hernandez v. Garcia Ortiz, 2015 WL 1821992 (N.D. Ga. Apr. 20, 2015) (Mr. Hernandez's 7-year-old child had lived in Georgia and Mexico, a 14-year-old child was "well settled" in her school and community. Similarly, the court found a 12-year-old child was well settled in her school and community. Id. at 2015 WL 1821992 (N.D. Ga. Apr. 20, 2015).

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Convention International Child Abduction Cases under the Hague Convention, National Center for Missing & Exploited Children, Criminal Division, U.S. Department of Justice

Fourth Hague Convention Defense: The Child is Well Settled in the New Environment

Two Elements for the Respondent Parent to Prove the Settled Environment Defense

Court also found no "grave risk" to return child to Mexico, finding respondent demonstrated by a preponderance of the evidence:

> "[a] preponderance of the evidence that the child is well settled in her new environment, and that the child's return would uproot her life."

Id. Hernandez v. Garcia Ortiz, 2015 WL 1821992 (N.D. Ga. Apr. 20, 2015) (Court had two factors "settled" in the environment). In re Abouhaiba, 2021 WL 2268 (Bankr. D. Ariz. Jan. 4, 2021) (Court found "well settled" in the environment, but "grave risk" of harm to child if return to Israel, such as child's mother was allegedly wrongfully retaining child, had "substantial" evidence child was well settled in her school, community, and extracurricular activities, and "strong" ties to father, and upsetting her extracurricular activities would be "disruptive." Id. at 2021 WL 2268 (Bankr. D. Ariz. Jan. 4, 2021).

Applying these elements, the court in Hernandez v. Hernandez, 2007 Tenn. App. LEXIS 790 (Tenn. 2007) found the "well settled" defense proven and upheld a finding of Probate. They had lived in Tennessee during their 10 years, the school bases and had close friends and family.

Settled Environment "Substantial" Hague Convention Defense: But What Does "Settled" Mean?

The Eleventh Circuit Court of Appeals "settled" in such a grave defense and "well settled" Hague defense. Blanc v. Rosa Castro, 2020 U.S. App. LEXIS 1 (11th Cir. 2020). In Blanc v. Rodriguez-Rosa Castro, 2020 U.S. App. LEXIS 1 (11th Cir. 2020), the court stated:

> The Hague court looked to the U.S. State Department for interpretation of "settled":
>
> *The Convention does not provide a definition of the term "settled." However, the U.S. State Department has declared that "nothing has an adverse effect on the child's significant connections in the new country is intended to suffice to meet the respondent's burden of proof."*
>
> *Public Notice 957, Text and Analysis of Hague International Child Abduction Convention, 51 Fed.Reg. 10494 (March 26, 1986), State Dep't Dec. 28, 1987.*

Due to a court is upheld the well settled defense, a preponderance of the evidence must show that the child has significant connections in the new country, and that the child's return would "uproot her life." Hernandez v. Garcia Ortiz, 2015 WL 1821992 (N.D. Ga. Apr. 20, 2015) (Court found "well settled" in the environment). Hernandez v. Ortiz, 2015 WL 1821992 (N.D. Ga. Apr. 20, 2015) (Court found "well settled" in the environment). In re Abouhaiba, 2021 WL 2268 (Bankr. D. Ariz. Jan. 4, 2021).

Setting aside the "substantial" evidence of the child's significant connections in the new country will be enough to meet the burden proving the "well settled" defense, the court in Blanc v. Rodriguez-Rosa Castro, 2020 U.S. App. LEXIS 1 (11th Cir. 2020).

Temporal Scope of Blur:

The trial court observed that even on the period until the courts in the country of habitual residence can adjudicate custody, the child's "[c]ontacts with the Plaintiff [father] are not in issue." Id. at 1 (quoting Tr. 1/11/2021 at 4:1-5:1). Accordingly, the court found that:

Grave Risk of Harm Defense – The Ukraine War – Yurlovych v. Hryhoriuna

In one case, a mother filed a petition for return of her children under the Hague Convention, alleging that her children were being wrongfully retained in the United States. Yurlovych v. Hryhoriuna, Case No. 21-cv-10-RJS-SDA (S.D.N.Y. 2021).

The judge found, after, Russia invaded Ukraine in February 2022, Ukraine presented a grave risk due to its strategic importance, rendering it "a military target and a dangerous place to live." Id. at 2. The court also found that the children, as a high-risk area for schools underwent a forced evacuation "during which the little Ukrainian would experience the sounds of bombs." Id. at 2.

The court had to balance the remediable physical dangers posed by the war in Ukraine and the Convention's policy of returning children to their habitual residence for custody determinations.

Discretion to Consider Ameliorative Measures: Grave Risk of Harm Defense

Once a trial court has found return would expose the child to a grave risk of harm, the court not required to exercise of discretion to order return of the children. Id. at 2 (citing Blondin v. Dubois, 238 F.3d 162, 167 (2d Cir. 2001)). The court noted that "[c]ourts in *this* jurisdiction are clear that such exercise of discretion is not to be lightly undertaken." Id. at 2.

By providing a court "a mechanism" to order return upon finding a grave risk, Hague Convention, Article 13 "contemplates that the court will exercise that discretion to grant a return." Id. at 2.

In Ukraine, the United States Supreme Court rejected an abstention doctrine which would bar the Hague Convention's implicate a court, when determining if the Hague Convention's grave risk of harm defense applies, to consider if any ameliorative measures are available.

Whether or not there is a grave risk of harm to a child from a proposed return, ameliorative measures could mitigate the risk, although the parents disagree. Id. at 2 (citing Blondin v. Dubois, 238 F.3d 162, 167 (2d Cir. 2001)).

Keeping the Children Safe After Return: Ameliorative Measures

Ameliorative measures are "measures that are practical and of a psychological or legal nature, that are designed to the custody or remedial measures, which it can. They would if such because the risk to a grave. Should arise in the country of habitual residence." Id. at 2 (quoting Blondin v. Dubois, 238 F.3d 162, 167 (2d Cir. 2001)).

On the other hand, the district court in Baptiste v. Kennison, 554 F.3d 623, 635 (5th Cir. March 2, 2009) endorsed children returned to Haiti, "[a]lthough the country is in a state of chaos, the Haitian government is in place and is functioning to some degree." Id. at 2 (citing Baptiste v. Kennison, Case No. 07-30-RJS-SDA (S.D.N.Y. 2009) (E. Wesley Sweeney, J.)).

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Whether or not there is a grave risk

The United States Second Circuit Court of Appeals rejected a mother's broad assertion that a country's (Singapore) Syariah courts (which, she claimed would inevitably grant custody to the child's father) are incompatible with principles, "relating to the protection of human rights and fundamental freedoms" of the United States. *Souratgar v. Fair*, 720 F. 3d 96 (2d Cir. 2013). Despite political sympathies to which the mother's general assertions might give rise, the court declined to rule categorically that the mere presence of a Syariah Court in a foreign state, whose accession to the Convention the United States has recognized, *per se* violates due process. *Souratgar*, 720 F. 3d at 108. The court affirmed the grant of the father's petition for his son's repatriation to Singapore. *Id.* at 109.

Hague Convention Defense – Article 20: Foreign Countries

Spain

Decisions from other countries under Article 20 are rare. In one case, recognizing the defense, a Spanish Court denied a father's petition for return of a child to Israel from Spain. The child and mother were Spanish citizens. The court found that return would be contrary to principles of Spanish law concerning protecting human rights and basic liberties.

Following the parties' divorce and mother's taking the child to Spain, the father applied for, and an Israeli court granted him, sole custody upon a finding that the mother was 'Moredet," a status under Jewish law meaning she was a 'rebellious wife.' The Spanish court determined this finding would cause the absolute negation of the mother's parental rights and status in the Israeli community and declined to return the child. *In Re S.*, Auto de 21 abril de 1997, Audiencia Provincial Barcelona, Sección 1a. *See also Carrascosa v. McGuire*, 520 F. 3d 249, 261-63 n.28 (3d Cir.2008) (criticizing a Spanish court's using Article 20 to justify denial of repatriation and its construing an agreement not to take child out of the United States without both parents' consent as violating fundamental rights under the Spanish Constitution for citizens to travel and choose their place of residence).

Costa Rica

The court in Costa Rica applied the Article 20 human rights defense to a dad's child abduction claims against a mom in *L.R.C., a favor de J.C.R., y E.C.R., contra el Juzgado de Niñez y Adolescencia y El Tribunal de Familia*, INCADAT Ref. HC/E/CR 1320, Exp: 13-003521-0007-CQ, Res. No. 006644-2013, Sala Constitucional de la Corte Suprema de Justicia, Costa Rica (May 17, 2013).

Dad petitioned for return of two daughters, born in 2001 and 2006 in the U.S., where they were raised, went to school, and developed a social network. In July 2011, they entered Costa Rica and started school there. In November 2011, the father requested the mother's voluntary return of the girls to the US, which the Costa Rican Central Authority promoted. The mother refused.

A Costa Rican court ordered their return. Mom appealed unsuccessfully. She filed a petition for habeas corpus. The court granted the petition and ordered the girls not to be returned to the United States. In reaching its decision to refuse return, the Constitutional Division found compelling that the children had developed significant relationships in Costa Rica at school, with their family, and with their social network, and forcing them to leave the country against their wishes would harm them.

Israel

An Israeli mother established the Article 20 human rights defense to the father's claim she wrongfully abducted her three children from Israel and fled to Canada. The court found return to Israel would violate Canada's fundamental principles relating to protecting the mother's and children's human rights, and their fundamental freedoms to live free from serious risk of persecution.

The parents married in 2009 in Israel and had their children there. They separated. Mom got a protection order from the Israeli Family Court and began divorce proceedings in the Sharia Court. That court gave temporary guardianship to dad and ordered that mom's rights of custody terminate. She took the children to her parents' home.

The next day a grenade exploded outside their house. Two days later, she left Israel with the 3 children and grandparents. They moved to Canada, which granted the mother and children refugee status, because they'd face persecution in Israel. This refugee status put the burden on the father, which he failed to meet, to rebut a presumption against "non-refoulement" (forcible return of refugees or asylum seekers to a country where they are liable to face persecution). Therefore, the presumption protected mom and children for the purposes of applying the Hague Convention Article 20 defense. *Sabeahat v. Sabihat*, 2020 ONSC 2784, FS-18-0099 (May 7, 2020).

Searchable Hague Convention Decisions: INCADAT

As the court in *Rodriguez v. Yanez*, 817 F. 3d 466, 477 n. 44 (5th Cir. 2016) noted, the Hague Conference on Private International Law maintains a database of decisions concerning the Convention "to promote mutual understanding, consistent interpretation and thereby the effective operation of the … Convention." ***International Child Abduction Database (INCADAT)***, Hague Conference on Private International Law. The database is searchable by keyword and Hague Convention article (e.g., "Article 20"). Search the database by specific Hague defenses to child abduction claims.

Opportunity for Collaborative Resolution or Mediation

Child abduction cases under the Hague Convention are complex and fact intensive. The collaborative process or mediation may be difficult in such cases, yet still superior to (1) Hague proceedings to resolve return to habitual residence claims and defenses and (2) if return is ordered, full custody proceedings in the country of the child's habitual residence.

As the Aarabi court noted:

> *Child abduction cases are always emotional, and the Court can understand why Mr. Aarabi was justifiably distraught by the separation from his child and accusations about his past conduct. Unfortunately, emotions ran high in this case and led to personal attacks on Ms. Kerroum's character, her culture, her religion, and her family that pushed the bounds of zealous advocacy.* ***While cases under the Convention end with an order in favor of one parent, it is naive to think that the Parties' dispute ends here. The Parties face a custody dispute in Morocco and likely will have to co-parent in some respect going forward. The resentment bred by scorched-earth tactics will only hinder this cooperation and does not serve I.A. in any respect.***
>
> *Aarabi v. Kerroum, No. 1:2024-cv-0293-VMC (ND Georgia February 13, 2025)* (Emphasis added).

For information about mediation in the international context, see:

- US Department of State, Bureau of Consular Affairs, Using Mediation.
- The European Parliament Mediator for International Parental Child Abduction
- Geoff Wilson, International Academy of Family Lawyers, *Overview of Mediation Dispute Resolution in Child Abduction Cases* (YouTube video, March 10, 2014)
- Geoff Wilson, HopgoodGanim, *Overview of Mediation Dispute Resolution in Child Abduction Cases*, IAML Hague Symposium Bueno Aires 2013.
- Melissa A. Kucinski, *Culture in International Parental Kidnapping Mediations*, 9 Pepp. Disp. Resol. L.J. Iss. 3 (2009), available at https://digitalcommons.pepperdine.edu/drlj/vol9/iss3/5
- Melissa A. Kucinski, *Mediating International Child Abductions*, ABA, 2020 Family Advocate, Vol. 43, p. 33

For more about the Collaborative Process, read:

When Clients Retain Their Power: The Collaborative Law Process

Harness Collaborative Contract Power!

Include Allied Professionals in the Collaborative Process

Comparison Cost of Collaborative Divorce to Cost of Litigation

Conclusion

Proving defenses to child abduction claims under the Hague Convention requires analysis and development of all evidence and testimony that may support or defeat defenses to claims of wrongful abduction or retention. This article provides a framework for such analysis of the defenses the responding parent may raise.

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