Fleeing for Safety:
Representing Battered Respondents in International Child Abduction Cases Under the Hague Convention


Commission on
Domestic & Sexual Violence

IN COLLABORATION WITH
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Questioning the *Prima Facie* Case

WEBINAR # 3

MAY 27, 2015
1:00-3:00 P.M. (EST)
Questioning the Prima Facie Case

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As a result of participating in this workshop, you will be better able to:

- Understand the petitioner’s *prima facie* case under the Hague Convention on International Child Abduction;
- Understand how to effectively challenge the petitioner’s *prima facie* case; and
- Understand how domestic violence is relevant to challenging the *prima facie* case.
The Hague Convention on the Civil Aspects of International Child Abduction

...Desiring to protect children internationally from the harmful effects of their wrongful removal or retention ...

Convention Preamble

Focusing on Hague Convention cases for return* in the United States that involve allegations of domestic violence.

*The Convention seeks to protect both “rights of custody” and “rights of access.” But the remedy of return is not available in a case involving “rights of access.”
Before The Prima Facie Case

- A petition may be filed in either the state or federal court where the child is located.
- The child must be under the age of sixteen.
- The child must have been removed or retained from a country that is a Contracting State to the Convention.
- The Convention must be in force between the United States and the country from which the child was removed or retained (travel.state.gov maintains an up-to-date list of U.S. Treaty Partners).
In most cases the State Department will ensure that the Convention applies in a particular case.

- Not every petition is filed through the Central Authority.

- It is important to recognize a Hague Convention case right way, regardless of whether or not a petition has been filed.
Expedited Nature of the Convention

The Convention directs judicial and administrative authorities of Contracting States to act expeditiously (Article 1) and implies that proceedings under the Convention should be completed within six weeks from commencement (Article 11).
State Department Involvement

- What can the State Department do for the respondent?

- When you get involved as the respondent’s attorney, can you communicate with the State Department on your client’s behalf?

- What if your client has already been in communication with the State Department?
There are 5 exceptions to return:

- Art. 12: One year and settled
- Art. 13(a): Consent or subsequent acquiescence
- Art. 13(b): Physical or psychological harm or intolerable situation
- Art. 13: Objection of a mature child
- Art. 20: Human rights and fundamental freedoms
Petitioner’s *Prima Facie* Case
Why are we dedicating a whole webinar to the petitioner's case?

- Respondent's attorneys often focus on the exceptions.
- If the petitioner *fails* to meet his burden and prove his case, then the Convention *does not apply* and the remedy of return is not available.
The petitioner has the burden of proving by a preponderance of the evidence that the child was wrongfully removed or retained from his or her habitual residence in breach of the petitioner’s rights of custody which were being exercised at the time of removal or retention or would have been exercised but for the removal or retention.
The petitioner has the burden of proving by a preponderance of the evidence that the child was wrongfully removed or retained from his or her habitual residence in breach of the petitioner’s rights of custody which were being exercised at the time of removal or retention or would have been exercised but for removal or retention.
22 U.S.C. §9003:

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence—

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention
The petitioner has the burden of proving by a preponderance of the evidence that the child was wrongfully removed or retained from his or her habitual residence in breach of the petitioner’s rights of custody which were being exercised at the time of removal or retention or would have been exercised but for the removal or retention.
Article 1: Convention’s Objectives

➢ to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

➢ to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
Wrongful Removal or Retention

- What is a removal?
- What is a retention?
- What makes a removal or retention wrongful?
Removal and Retention

- physically taking the child out of the country
- keeping the child out of the country
The removal or the retention of a child is to be considered \textit{wrongful} where:
a) it is in breach of **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
b) 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 petitioner has the burden of proving by a preponderance of the evidence that the child was wrongfully removed or retained from his or her habitual residence in breach of the petitioner’s rights of custody which were being exercised at the time of removal or retention or would have been exercised but for the removal or retention.
Questioning the *Prima Facie* Case

- Was the child removed or retained from his or her country of habitual residence?
- Was the removal or retention in breach of the petitioner’s rights of custody?
- Was the petitioner actually exercising those rights at the time of removal or retention or would he have been exercising those rights but for the removal or retention?

*In other words: the petitioner must prove that the removal or retention was wrongful!*
Practice Pointers
for questioning the petitioner’s *prima facie* case

- Be wary of stipulating issues relevant to the petitioner’s *prima facie* case.

- Be sure to closely analyze the petition and develop any and all arguments available that the petitioner has failed to make a *prima facie* case for return.

- A case can be won by attacking a petitioner’s *prima facie* case and these arguments should not be overlooked.

- Alternatively, consider requesting that the court require the petitioner to obtain a decision or determination from the left-behind country’s authorities as to whether the removal or retention was wrongful within the meaning of the Convention [Article 15].
Was the child removed or retained from his or her country of habitual residence?
Habitual Residence

The date of removal or retention is often thought of as the threshold question in determining habitual residence because the court must find that the left-behind country was the child’s habitual residence immediately before the removal or retention.

Date of removal or retention, however, does not have as significant an impact on habitual residence analysis as it does on well-settled exception.
Neither the Convention nor ICARA define habitual residence.

Courts have interpreted the phrase according to its ordinary meaning.

Most courts hold that a person can have only one habitual residence at a time.

While habitual residence has been considered the same as an “ordinary residence,” it is not necessarily the same as domicile.
Habitual Residence: Generally

- U.S. courts analyze habitual residence as a mixed question of fact and law, based on the circumstances of the particular case.

- If the child was not removed or retained from his or her habitual residence, then the Convention does not apply and the petition must be denied.
Habitual Residence: 3 Approaches

- **Last Shared Parental Intent: 1\textsuperscript{st} 2\textsuperscript{nd} 4\textsuperscript{th} 5\textsuperscript{th} 7\textsuperscript{th} 9\textsuperscript{th} & 11\textsuperscript{th} Circuits**
  - Doesn’t ignore the child's experience, but rather gives greater weight to the parents' subjective intentions relative to the child's age

- **Child’s Perspective: 6\textsuperscript{th} Circuit**

- **Mixed Approach: 3\textsuperscript{rd} & 8\textsuperscript{th} Circuits**
  - Doesn’t ignore parental intent but makes it subsidiary to the child’s objective circumstances
Habitual Residence: Parental Intent

Often Referred to as the Settled Purpose or Settled Intent Approach

- This approach presumes that a child’s habitual residence is determined by the intent of the child’s parents to either remain temporarily or settle in a particular location.

- “[T]he family must have a ‘sufficient degree of continuity to be properly described as settled.’”

- This approach recognizes “the importance of intentions (normally the shared intentions of the parents or others entitled to fix the child's residence) in determining a child's habitual residence”
Habitual Residence: Parental Intent

Key Cases

*Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001)
- Child’s habitual residence based on the intention of the person or persons entitled to fix the child’s residence.
- Shared intent must be accompanied by an actual change in geography and the passage of time.

*Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005)
- If the child is moved to a new location but the parents do not intend his or her habitual residence to change, then it has not changed, unless “the evidence points unequivocally to the conclusion that the child has become *acclimatized* to his new surroundings and that his habitual residence has consequently shifted.”
Habitual Residence: The Child’s Perspective

This approach focuses on the child’s experience, not the parents’ intent, in determining habitual residence of the child.

Key Cases

Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993): the court held that it “must focus on the child, not the parents, and examine past experience, not future intentions” when determining habitual residence.

Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007)

- Criticized and rejected the Mozes court’s approach.
- Held “that a child’s habitual residence is a nation where the child has been present long enough to allow ‘acclimatization’ and where his presence has a ‘degree of settled purpose from the child’s perspective.’”
Some circuits take a mixed approach to habitual residence, considering both parental intent and the child’s perspective.

**Key Cases**

_Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995):_ “Guided by the aims and spirit of the Convention and assisted by the tenets enunciated in _Friedrich_ …we believe that a child's habitual residence is the place where he or she has been _physically present for an amount of time sufficient for acclimatization_ and which has a ‘degree of settled purpose’ from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.
Habitual Residence: Mixed Approach

Key Cases cont.

*Stern v. Stern*, 639 F.3d 449 (8th Cir. 2011): looked to “the settled purpose of the move...from the child’s perspective,” along with other factors including parental intent, the passage of time, and the child’s acclimatization to the new country.
Considering the Child’s Perspective

In either the Sixth Circuit or under the Mixed Approach

- The court will not necessarily interview the child
- The court may focus on what the child is experiencing with regard to:
  - Schooling
  - Medical Care
  - Child Care
  - Community Involvement
- These factors are similar to the well-settled analysis
- A close examination of the facts and circumstances of the child’s residence in the left-behind country is also appropriate
Determining Parental Intent

- Reasons for the move
- What the parents have done with their home and belongings in the left-behind country
- Where the respondent and child are staying in the new country (meant to be permanent or temporary, purchased home or leased)
- Where their bank accounts are maintained
- The parties’ immigration or asylum status in the new country
Determining Parental Intent

- Retention of ties to former country
- Airline tickets – one way or round trip
- Tax returns
- Employment circumstances
- Driver’s license, health insurance
- School enrollment
Exercise in Determining Habitual Residence

YOU BE THE JUDGE
Case #1

- Father is citizen of NZ, has resided in US since 1985, and is a naturalized U.S. citizen
- Mother is citizen of South Africa, naturalized U.S. citizen
- Mother and Father married in Texas in 2005
- They adopted baby in Texas in 2008
- In late 2009, the family leased their home in Texas and moved to NZ
- Mother returned to the U.S. with the child in April 2013

Father still owns the home in Texas. The move to NZ was precipitated by Father’s desire to take care of his ailing mother. Mother claims that caring for her mother-in-law was the limited purpose of their move and that the move was to be of limited duration. They resided first with relatives and then leased a house under an annual lease. Father never really sought employment, and the couple had financial troubles. Mother therefore started working in 2010 with a NZ company under an annual contract. The couple nonetheless experienced difficult financial circumstances. Mother expressed a desire to return to Austin, but father thwarted those plans by depleting savings.

They separated in August 2012, with mother remaining in leased home with child and father moving in with his sister. From August until April 2013, they shared time caring for the child via an informal agreement. Mother claims father always agreed that the stay in NZ would be temporary. She said that they moved there only on father’s representations that the move was temporary, for 1 year to 18 months. Father testified that he knew mother was unhappy in NZ and expressed a desire to return.

Mother claims that even after the parties separated, father agreed that child would move back to Austin with mother, as long as she didn’t leave until the end of the school year, which was March. He expressed this agreement in an e-mail. Based on that, in February 2013, Mother gave notice at her job that she would be leaving and began to search for employment in the US. Mother also contacted a Texas family attorney prior to leaving. At this point Father expressed a desire that the child remain in NZ during her “schooling years.” When mother returned to Texas, the child had lived less than one year in Texas and 4 years in NZ.
Case #2

- Mother is a Mexican citizen who lived in the US without documentation.
- In 2004 Mother met Father, a U.S. citizen; they were never married.
- In 2007, the relationship ended, but soon after Mother learned she was pregnant.
- April 2010, Mother was deported and child stayed with Father.
- July 2010, paternal grandmother took child to Mother in Mexico.

Child lived with Father from mother’s arrest in January 2010 (which led to her deportation) until going to Mexico with paternal grandmother in July 2010. There was disputed testimony about the parent’s intentions regarding how long the child would stay in Mexico, though they did agree that it would be at least until Oct. 2010. Mother enrolled child in school in Mexico.

In October 2010, mother took child to border to deliver to father, who agreed to return the child to mother a few months later. In January 2011, father returned child to mother.

Parties discussed possibility of mother investigating how to return to the U.S. legally. Father claims that it was his understanding that child would only be in Mexico a month; Mother testified that the plan was for child to stay in Mexico for at least the school year, since she remained enrolled in school.

At this time Father did not attempt to retrieve child or express desire for her return. He did not visit child until August 2011, when he expressed his desire to return to the U.S. with her. Mother objected.

Father returned to U.S. without child. He returned to Mexico for a brief visit in November 2011 and subsequent to that voluntarily sent monetary support to mother. He returned at Christmas and parties discussed renewing their relationship. However, mother says she was non-committal. Father testified that mother agreed to let the child go with him to the U.S.

Father took the child in the middle of the night without waking mother. He boarded a bus bound for the U.S. with the child, but when mother woke up and noticed child was gone, she went to the police who later stopped the bus and returned the child to her. Father investigated filing an Application for return of child under the Hague Convention but never did so.

In March 2012, Father visited child in Mexico. In June 2012, Father and mother agreed to meet again in a Mexican border town, so that father could purchase a car for mother and visit with child. While mother was busy, father left and crossed the border into the United States. One week later, Mother filed an Application for Return of child under the Hague Convention.
Case #3

- **2006**: Mother (citizen of Mexico) and Father (citizen of U.S.) live together in Mexican border town.
- **2008**: Mother gives birth to twins in Mexico.
- **2009**: Father establishes residence on U.S. side of border for work. Twins obtain U.S. citizenship and passports and split their time between Mexico and US.

Mother and Father agree that they will establish residence for the twins in the U.S. so they can take advantage of education, medical help, and government support in U.S.

In the Fall of 2010, mother and father break up. Mother keeps twins in Mexico and denies Father access to them for two months.

From Christmas 2010 to February 2011, the twins split their time between Mother and Father evenly.

In February 2011, mother would not regularly meet father as previously agreed or respond to his messages to go to the border so he could take the twins to the United States.

March 2011, Father picked up twins and then texted mother that he would not be returning them.

April 2011, Mother files Application for Return of the Twins.
Case #4

Father is citizen of Israel. Mother has dual U.S. and Israeli citizenship.

Father moves to the US in 1995.

Mother and Father meet in U.S. in 1999 and marry later that year.

In 2000, their son is born in the U.S.

Family moved to Israel in March 2001.

In June 2002, Mother came back to U.S. with child presumably for a visit. However she did not return to Israel.

Early in 2001, before the move, Father sought to convince mother to move to Israel because they could save money living with his mother. Mother was wary, but ultimately agreed to try living there for one year.

The family moved to Israel in March 2001. Father closed bank accounts, sold their cars and leased a new car in Israel. He placed their furniture in storage. Later, Father sold all the items in storage to mother’s sister.

Father spent considerable time and money on renovations on his mother’s house in Israel, where the family resided. Mother enrolled child in day care in Israel.

In February 2002, the family came back to the US for a visit. Mother expressed a desire to remain in the US, but father and a mutual friend convinced her to give Israel six more months and if still unhappy then, she could return to the US.

In June 2002, Mother came back to US with child presumably for a visit. However she did not return. It’s unclear when father learned of mother’s intention to remain in the US with the child.

In July 2003, father filed a Petition for return of child.
Domestic Violence and Habitual Residence
In an abusive relationship, the decision on where to live may not be a mutual decision, but another factor in a broader pattern of coercive control.

The court’s “habitual residence” analysis should take into account “the coercive and controlling attributes of domestic violence” and their affects upon a couple’s decision of where to live.
Interviewing 22 Women Reported:

- Being tricked into relocating;
- Prevented from returning to the U.S. when they arrived in the other country; and
- Being forced by potentially life-endangering threats to accompany their husband to the other country.
Once in the other country, mothers reported a variety of strategies used against them to keep them and their children from leaving:

- Being purposefully isolated from others;
- Having limited access to the family’s funds; and
- Having their and their children’s passports taken away and hidden or destroyed so they could not leave.

On seeking help in the left-behind country:

- Most mothers reported multiple attempts to seek help (formal and informal) prior to leaving the left-behind country
- Seeking help sometimes resulted in further reinforcement of their violent husbands’ positions by the authorities.
Argue that the court should consider coercion as to residence in the habitual residence analysis; otherwise a batterer would be able to achieve a forum of his choosing through coercion.

Never assume: ask your client about the circumstances surrounding family moves.

Consider making the argument that the respondent never intended to live in a country that could not protect her from an abusive partner.
Key Cases

Those courts that have considered domestic violence and habitual residence have focused on the way domestic violence affects “settled purpose”

*Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004): The court found that the children’s habitual residence did not change from the United States to Mexico, even after almost three years in Mexico, because the relocation was “clearly condition[ed]” on the marriage improving.

*Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001): Recognizing that in situations of verbal and physical abuse of a spouse a mere “settled intent” inquiry may not be sufficient because the family’s choice of residence may have been coerced.

Some courts have looked at the timing of the abuse and the move

**Silverman v. Silverman**, 338 F.3d 886 (8th Cir. 2003): Recognizing that habitual residence is not established when the removing spouse is coerced to move or to remain in another country, but noting that the abuse must occur prior to or immediately after a relocation.

**Ostevoll v. Ostevoll**, No. C-1-99-961, 2000 U.S. Dist. LEXIS 16178 (S.D. Ohio Aug. 16, 2000): The court found that for much of the respondent’s time in Norway she remained there “voluntarily, albeit reluctantly,” and as a result, Norway was the children’s habitual residence.
Questioning the *Prima Facie* Case

Was the removal or retention in breach of the petitioner’s rights of custody?
Article 5: Rights of Custody

For the purposes of this Convention –

a) “rights of custody” shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence
Article 3: Rights of Custody

- Under the law of the State in which the child was habitually resident
- By operation of law
- By reason of a judicial or administrative decision
- By reason of an agreement having legal effect under the law of that State
At The Time of Removal or Retention

- This inquiry does not require a custody determination.

- “Chasing orders” – orders granting custody after the child has been removed or retained – cannot change a permissible removal into a wrongful retention after the fact.
Courts have held that both a *ne exeat* right and rights of *patria potestas* are rights of custody within the meaning of the Convention.

**Key Cases**

*Abbott v. Abbott*, 560 U.S. 1, 9 (2010): Rights of custody within the meaning of the Convention are those rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.
Rights of Custody: Practice Pointers

- The petitioner **bears the burden** of establishing that he has rights of custody and he should be required to meet that burden.
- Analyze the petitioner’s evidence regarding the custody provisions of the habitual residence country.
- Be sure that the statutes relied upon were in effect at the time of the removal or retention.
- Confirm that the statutes relied upon are from the state or province where the parties resided within the habitual residence country.
- Determine whether there are any choice of law rules implicated.
Do not assume that a parent with “visitation rights” or “parenting time” does not have rights of custody within the meaning of the Convention:

- The “law” must come from the habitual residence country; but
- The meaning is derived from the Convention’s definition.
Questioning the *Prima Facie Case*

Was the petitioner actually exercising those rights at the time of removal or retention or *would* he have been exercising those rights *but for* the removal or retention?
“Exercise” of rights may be found whenever a parent with custody rights keeps, or seeks to keep, any sort of regular contact with the child.
Practice Pointers

- Typically, the petition will assert petitioner’s *prima facie* case and will likely seek to preempt applicable exceptions under the Convention.

- The petition may also include a copy of any relevant decision or agreement; a certificate or affidavit from a Central Authority or other competent authority concerning the relevant law of the alleged habitual residence; or any other relevant document.
Practice Pointers

- The petitioner may request that the child be picked up by the U.S. Marshal or local law enforcement official before the respondent is served with the petition.

- The court may order the children removed from the respondent’s care and may transfer custody to the petitioner, other family members, or the state during the pendency of the case.

- Respondent can offer to surrender her and the children’s passports or post bond to alleviate the court’s concern about re-abduction in lieu of removing the children from her care.

- The respondent may offer viable placement options in case the court does order removal, to ensure that children are placed with responsible caretakers with whom the respondent is comfortable rather than placed with the state.
There is no prescribed time within the Convention or ICARA for a respondent to file an answer to a petition for return, but because Hague Convention cases are expedited procedures, it is advisable to file a response promptly.

A court may expect the respondent to file an answer at least within the time period required by the local rules and if an answer is not filed, the respondent risks entry of a default judgment.

Whenever possible, attorneys should make every effort to prepare expected pleadings and case filings early. Do not wait for the court to set a deadline before beginning to draft a response. In some cases, a taking-parent may seek counsel before a petition has been filed.
Attorney Practice Guide

Available On-Line at Hague DV.org
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