Child Abduction and Other Aspects of International Family Law

by Amy Sara Cores

The very idea of dealing with clients located in other countries, compliance with international treaties and foreign law, and of course the unavoidable language barrier, is daunting to most family law attorneys. These are cases best left to the experts, right? However, even in a seemingly typical family law case questions relating to international law arise. This article seeks to demystify international law issues related to family law practice.

SETTLEMENT AGREEMENT CONSIDERATIONS WHEN PARTIES HAVE CHILDREN AND UNAUTHORIZED REMOVAL TO A FOREIGN COUNTRY IS POSSIBLE

In most divorce or custody cases the threat of a parent kidnapping a child to another country is minimal. However, when one or both of the litigants has substantial contacts with a foreign country, it is imperative that a settlement agreement provide for the continuing jurisdiction of the New Jersey courts with regard to issues concerning the children. Additionally, the agreement must provide a mechanism for the return of the children, in the event that one of the parties wrongfully retains a child in a foreign jurisdiction, as well as sanctions for such a breach. This also is essential when there is reason to believe that one or both of the parents will be taking the child(ren) out of the United States on a regular basis.

Certainly a practitioner cannot account for all eventualities in every case. The proposed draft of the Uniform Child Abduction Prevention Act (UCAPA) identifies several factors that should be considered when determining whether there is a risk of abduction in a particular case. These factors are relevant, not only to identify persons likely to kidnap a child within the United States, but also to identify persons likely to kidnap a child outside of the United States. The factors are as follows:

a. Has previously abducted or attempted to abduct the child;
b. Has threatened to abduct the child;
c. Has recently engaged in activities that may indicate a planned abduction including: abandoning employment; selling a primary residence; terminating a lease; closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents, or conducting any unusual financial activities; applying for a passport (for the person or child); seeking to obtain the child's birth certificate or school records;
d. Has engaged in domestic violence, stalking, or child abuse or neglect;
e. Has refused to follow a child-custody determination;
f. Lacks strong familial, financial, emotional, or cultural ties to the state or the United States;
g. Has strong familial, financial, emotional, or cultural ties to another state or country;
h. Is likely to take the child to a country that: (is not a party to the Hague Convention, or is a party to the Hague Convention, but that State is non-compliant according to the State Department, or the treaty is in force between that Country and the United States...);
i. Is undergoing a change in immigration or citizenship status...;
j. Has had an application for United States citizenship denied;
k. Has forged or presented misleading or false evidence..,to obtain or attempt to obtain [official government documents];
l. Has used multiple names to attempt to mislead or defraud; or
m. Has engaged in any other conduct the court considers relevant to the risk of abduction.[1]

The practitioner must decide if this is a real threat in a given case, and prepare an agreement accordingly. The more of these factors that are present, the greater the likelihood of a parental kidnapping. However, the absence of any of these factors does not eliminate the possibility of a kidnapping.

If kidnapping is a concern, if one or both of the parents intend to travel internationally with the child on a regular basis, or if the parties agree that a parent will be permitted to move to a foreign jurisdiction with the child(ren) and that state[2] is a party to the Hague Convention on the Civil Aspects of International Parental Kidnapping, then the following language is suggested to be included in the parties' agreement:

> This AGREEMENT shall be construed in accordance with the Laws of New Jersey. The parties have been habitual residents of the State of New Jersey, County of (X) from (month/year) until present. All of the parties' children are habitual residents of the United States, as defined by The Hague Convention on the Civil Aspects of Inter-

> national Child Abduction, as of the date of the execution of this AGREEMENT. The children attended school, have physicians, friends, activities, and generally lived their lives in New Jersey (for more than five years prior to their removal to (State X), or, for the past five years). Moreover, the infant children are citizens/nationals of the United States and as such the United States has a continuing interest in future court proceedings respecting the welfare of the children. The Superior Court of New Jersey, has continuing exclusive jurisdiction pursuant to the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), N.J.S.A. 2A:34 *et. seq*. The parties hereby agree that all issues relating to custody and support shall be governed by New Jersey law. The parties hereby agree that in the event that either party is compelled to file an application with the court for enforcement or modification of this AGREEMENT, that same shall be filed in the Superior Court of New Jersey.

If a move is not contemplated at the time of the agreement, or if there is a threat that the child(ren) may be removed to a non-Hague country, the following language is suggested:

> The State of New Jersey in The United States of America, is the habitual residence of the minor children. The terms of the Hague Convention of October 25, 1980, adopted by the 14th Session of the Hague Conference on Private International Law, apply if a parent abducts or wrongfully retains a child in a foreign country.

Even if the foreign country is not a party to the Hague Convention, this provision may assist in securing the return of children to New Jersey. However, abduction to or wrongful retention in, a non-Hague Convention country or a non-compliant Hague Convention country will be difficult, at best, regardless of the language of the property settlement agreement.

If the children do not have passports, the attorney may want to consider adding language to the agreement that the children will be enrolled in the Children's Passport Issuance Alert Program.[3] The parties' agreement also should provide that when one parent seeks to take the child out of the country he or she must have written permission from the other parent. Although the federal government does not regulate the borders such that officials will stop an individual with valid travel documents from exiting the country and airline officials do not routinely check for written permission when parents are traveling with children internationally, it is a deterrent. If a child is eligible to obtain a passport from a foreign country, a parent also can request through the embassy or consulate that the passport not be issued.

While practitioners cannot provide for all potential scenarios in every property settlement agreement, they can identify situations that are likely to occur post-judgment, and protect their clients, as well as their children.

TRANSLATION ISSUES

If the parties were married in a foreign country, one or both of the parties may want to seek a divorce in the other country as well. For example, the husband and wife were married in France, and the wife is French and intends to reside in France after the New Jersey divorce. If the wife intends to marry again in France, she also will need a French divorce.

The following language is suggested to be included in the parties' agreement:

> Annexed hereto as EXHIBIT X is a translation of this Agreement into [French]. Both documents shall be filed with the Superior Court of New Jersey and annexed to any final Judgment entered in New Jersey. Both the English and [French] language versions of the texts shall be equally authentic, however, in the event that a dispute arises over the interpretation of this document the English language shall govern. The Wife shall file and register the Final Judgment of Divorce and the Property Settlement Agreement in any future proceeding in the [French Family Courts]. The Wife shall provide the Husband with proof of same within thirty (30) days of receipt of the foreign judgment, but no later than three (3) months from the date of the entry of the Final Judgment of Divorce in New Jersey.

It is essential to note in the agreement that one of the parties intends to register the judgment of divorce in a foreign jurisdiction. As will be explained below, the United States is not a party to any international enforcement or registration of foreign judgment orders treaty. Unless an agreement makes this reference, the party seeking a judgment in a foreign jurisdiction has no obligation to register the agreement. Practitioners may wish to consider adding a clause to the agreement, which bars either party from taking a child out of the country until proof of registration has occurred.

A FEW CONSIDERATIONS CONCERNING THE HAGUE CONVENTION

A full discussion of the Hague Convention is not possible due to the limits of this article. Most practitioners will not handle a Hague Convention case, and will refer them to other counsel or bring in consulting counsel. However, should an attorney undertake a matter, there are several important resources available. The State Department[4] website has a plethora of information regarding countries that are signatories to the Hague Convention, as well as links to other sites of importance. If the child has been abducted from this jurisdiction, the forms necessary to complete an application for the return of the child can be found on this site as well.

Preparing an application for the return of a child to the United

States is a relatively easy process, which does not necessarily require the assistance of counsel. However, all documents will need to be translated into the official language of the country to which the child has been abducted. When seeking the return of a child abducted to the United States, the federal statute provides that, given the urgency of a Hague Convention petition, no authentication of foreign documents or information included with the petition is required.[5]

Article 24 of the Hague Convention provides that an application must be accompanied by a translation into the official language of the requested state. If that is not feasible, a petitioner may provide a translation into French or English. The contracting states may object to the use of French or English, but not both. If a petition is filed that requests return from the United States it must be translated into English, and, of course, France requires that a petition be translated to French. However, it is not necessary to have a certified translation, which can save the client a substantial amount of money on the application, as the translation of legal documents can be very expensive.[6]

A practitioner should not, however, cut and paste the application into Google translator. The online translation programs are not capable of translating complex legal documents, and a computer cannot replace a human in these instances. The reader will find the resulting translation either unintelligible or hilarious. Regardless, the client will not be served well.

As a hypothetical example, a practitioner decides to represent a parent from country X whose child has been abducted and brought to New Jersey. The primary issue is whether the case should be filed in federal or state court in order to secure the return of the child to his or her home state.

The Hague Convention implementing statute, found at 42 U.S.C. §11605 (1995), confers subject matter jurisdiction on both the state and federal courts. However, there are several factors that must be considered in making the decision as to where to file the case. First, while the state court judges are more familiar with family law issues, federal court judges are more familiar with the Hague Convention and the related jurisprudence. Second, a federal court judge is also more likely to have handled a Hague Convention case then a state court judge. Third, the Hague Convention provides that the petitioner is entitled to a hearing within six weeks of filing the initial petition. Federal courts act swiftly on these applications and move the proceedings without delay. Fourth, the Hague Convention specifically cautions against a best interests analysis in determining whether a child should be returned to his or her country of habitual residence. Federal court judges are less likely to engage in a best interest analysis than state court judges.

Furthermore, practitioners' apprehension of federal court is also an important consideration. In order to file in federal court, one must be licensed in the federal court and familiar with the federal rules of procedure and evidence. A practitioner may choose to file in state court simply based on his or her own comfort level. Most family law practitioners do not regularly engage in federal court litigation and may not want to file in federal court for that reason alone. Also, a practitioner will need to register with the PACER service and learn how to use the electronic filing system, which is mandatory in the federal courts.

These are but a few of the aspects of handling a case under the Hague Convention. Further resources are available online through the State Department and the National Center for Missing and Exploited Children.[7]

FOREIGN SERVICE OF DOCUMENTS

How does a practitioner serve a complaint on a defendant who lives in China? The first step is to consult with the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (service convention). Pursuant to the service convention, the United States has set up a central authority for assistance with matters pending in federal courts.[8] For actions pending in state courts, state law designates the person authorized to effect service. However, the same forms are used to request service.

Form USM-94, titled, "Request for Service Abroad of Judicial and Extrajudicial Documents," must be completed. The form includes a summary of document to be served. The completed request form and documents to be served, which includes translations into the native language of the receiving country, if not English, should be mailed directly to the foreign central authority, as provided by Article 3 of the service convention. Form USM-94 requires a designation of the method of service to be used by the foreign central authority. Formal and informal methods of delivery, as well as personal service, may be designated.

The central authority of the receiving country will complete the certificate contained with the form and return the certificate to the requesting party. The State Department estimates that it can take two months to accomplish service under these methods.

However, Article 10 of the service convention provides for methods of service by private parties directly between countries, but again practitioners must check the receiving countries ratification of the service convention, as they may have objected to this form of service. Article 10 permits service of judicial process by the following methods: a) by "postal channels directly to persons abroad"; b) by judicial officers, officials or other competent persons in the state of destination at the request of the same in the state of origin; or c) by

judicial officers, officials or other competent persons in the state of destination at the request of an interested person in the state of origin.

Article 8 permits the service of judicial process through the diplomatic or consular agents of the country of origin, but this too is subject to the consent of the state of destination. It is also likely that the documents will need to be translated into the language of the receiving state, even if both the plaintiff and defendant are U.S. citizens.

If the receiving state is not a party to the service convention, it is suggested that the plaintiff use personal service or registered international mail. Once personal service is effected or a signed receipt for mailed documents is obtained, then proof of receipt can be filed with the court. For further guidance, practitioners should consult with New Jersey Rules of Court Rule 4:4-4 and Rule 4:4-5. It may be necessary to make an application with the court to request acceptance of this alternate form of service. There is always a risk of an attack on a judgment obtained without proper service on a defendant.

AFTERTHOUGHTS ON *MACKINNON*

On June 11, 2007, the New Jersey Supreme Court rendered a decision in the *MacKinnon* case.[9] Presently the attorneys for Mr. MacKinnon are seeking *certiorari* from the Supreme Court of the United States to hear this important case.[10] The facts simply stated are that Ms. MacKinnon, a Japanese national but resident of New Jersey for over 15 years, sought to move to Japan with the parties' daughter incident to the divorce proceedings. Mr. MacKinnon opposed the move. The trial court applying *Baures v. Lewis,*[11] held that Ms. MacKinnon met the standard and granted her request to move to Japan with the child. The decision confirms the general practice that *Baures* should be applied to all removal cases, including international ones.

The *Baures* test should be applied to international removal cases. However, the courts of this state did not adequately consider the impact of an international removal, and failed to specify additional factors to be applied in international removal cases. Instead, the court relied on the catch-all factor in *Baures*. In light of the fact that the United States has no international enforcement agreement with any other country, Mr. MacKinnon has *de jure* lost any right to enforce the visitation he was granted.

There are several troubling aspects of the *MacKinnon* decision. First and foremost, there are no mechanisms through which Mr. MacKinnon can enforce his parenting time, should Ms. MacKinnon fail to bring their daughter to the United States. Counsel for Ms. MacKinnon conceded, during oral argument at the Supreme Court of New Jersey, that her client might not return the child to the United States once removed. There are no international enforcement treaties, and, as noted by the trial court in its decision, the Japanese courts are not likely to voluntarily choose to recognize and enforce the order. Even if Mr. MacKinnon obtains a court order enforcing the parenting time aspect of the judgment of divorce from the court in New Jersey, he cannot compel the custodial parent, now living in Japan, to comply.

As practitioners, we face difficulties enforcing visitation when both parents reside within New Jersey. Imagine the complexity of enforcing visitation in another country, especially one that does not generally recognize the rights of the non-custodial parent.

Second, the trial court ordered the parties to submit to the personal jurisdiction of this state. This is despite the fact that Ms. MacKinnon is residing permanently in Japan and is a Japanese citizen. Our court rules and the common law of the state and federal courts set forth the standard by which personal jurisdiction can be obtained.

Should practitioners remember back to their first semester of law school when infamous cases like *International Shoe Co. v. Washington*[12] and *Pennoyer v. Neff*[13] were discussed, they will recall the discussion of minimum contacts. Under the minimum contacts analysis a court must consider the following: 1) whether the defendant has sufficient contacts with the forum state; and, 2) whether in light of other facts the assertion of personal jurisdiction comports with fair play and substantial justice.[14]

N.J.S.A. 2A:4-30.68 provides for the exercise of personal jurisdiction over non-residents in custody matters, and of course the parties can consent to submit to the ongoing jurisdiction under the laws of New Jersey. Here, Ms. MacKinnon was ordered to consent to ongoing jurisdiction. However, this analysis pre-supposes that any proceedings or findings in the New Jersey Courts will be given comity by the Japanese Courts. Acknowledging that the Japanese Courts will not recognize a decision of our courts renders the decision of the Court in *MacKinnon* meaningless. An order is only as good as it is enforceable.

Additionally, the Hague Convention was considered relevant in the proceedings. The Court held that a removal to a non-Hague Convention country could be ordered after applying the *Baures* factors. Ms. MacKinnon was granted primary physical custody, as well as permission to reside in Japan with the child. Mr. MacKinnon was granted visitation three times per year. The Hague Convention is not applicable as Japan is not a party. There are no mechanisms through which the non-custodial parent can enforce his rights.

The trial court found that as a practical matter, Japan would not be bound to recognize the foreign judgment or give comity to the laws or orders of New Jersey. If a parent violates a parenting-time provision, the courts of this state would have the remedy of ordering "make-up"

parenting time. In this matter, even if the Hague Convention were a viable option, the proceedings would take a minimum two months, and make-up parenting time would be virtually impossible due to the school calendar in Japan and the distance between the parties.

The Court also retained subject matter jurisdiction, namely, jurisdiction over the parties' child. Since there is no treaty in effect between the United States and Japan, the Japanese courts have no obligation to recognize this aspect of the order. Under our laws, the retention of subject matter jurisdiction is proper. However, Ms. MacKinnon need only apply to the local courts in Japan to usurp the New Jersey Court ruling, or simply fail to comply with the order. Again the non-custodial parent is without legal remedy. Alternatively, a non-custodial parent could attempt to re-litigate the matter in a foreign jurisdiction that has no obligation to recognize the judgment of the New Jersey Courts.

Baures should apply to an international removal case; however, it should be a "*Baures* Plus" analysis. The following plus factors should be considered by practitioners and judges: 1) whether the law of the foreign country recognizes and enforces the visitation rights of the non-custodial parent, which would give the non-custodial parent a mechanism through which his or her rights can be enforced; 2) whether the foreign country is "Hague friendly," in that it is a party to the kidnapping treaty and complies with petitions for the return of children, or has returned children without being a party to the Hague Convention; 3) whether the foreign country is a party to the Hague Service Convention, so the parent removing the child can be efficiently served; and, 4) the cultural implications of the move on the child, including but not limited to, the amount of time previously spent in the country, whether the child speaks the language of the other country, the level of development of the other country (specifically the town or city to which the parent seeks to move). If these factors were considered in *MacKinnon,* the move might not have been permitted.

The unfortunate implication of the *MacKinnon* decision is that an international removal is no different than an interstate removal, or put another way—place does not matter. Nothing could be further from the case. While a removal to Canada or Great Britain raises one set of issues, a removal to Cambodia or North Korea raises an entirely different set of issues. With virtually all of the states within the United States having adopted the UCCJEA, a court order entered in New Jersey is enforceable through a relatively simple process. A court order entered in New Jersey may be worth nothing more than the paper it is printed on to a foreign country.

As more cases involve parents whose careers take them to international locations for work, or who have moved to the United States from a foreign country and seek to return after a divorce, we will begin to see the complexities involved with the enforcement of custodial rights in the international arena. Finally, a narrow reading of *MacKinnon* should be followed by family law judges and practitioners. The facts in *MacKinnon* led the trial court to determine that, under *Baures*, the mother's request was appropriate, and this may not be so in every case.

A FEW DOS AND DON'TS

Do not assume that everyone speaks English in the rest of the world. It is true that in most countries English is taught in school. However, not all people who learn English are comfortable speaking the language. Moreover, depending on the age of the person and country in which he or she lives, he or she may not speak English at all. This, of course, makes it all the more difficult to communicate complicated legal concepts, and is, perhaps the most challenging aspect of dealing with foreign clients.

Do remember that there is likely to be a time difference between the East Coast and the other country, which can be substantial at times. If a client is going to make a telephonic appearance in court, the hearing will need to be scheduled at a time certain, and it should be explained to the court and all concerned parties that timeliness is essential. For example, if a client is in Australia there is a 16-hour time difference between Australia and New Jersey.

Do not assume the law in the foreign jurisdiction is similar to the laws of New Jersey, or that the parties have a detailed agreement. In most countries a basic decree of divorce is entered and parental rights flow from a code or statute. In some countries not only do the parents have rights relative to the children, but the children have rights relative to the parents. In some countries children have no rights. In some countries, the gender or age of the child determines which parent is granted custody. This may happen by operation of law, rather than agreement of the parties. Therefore, do learn and become familiar with the law of the foreign jurisdiction.

Do learn and become familiar with the foreign jurisdiction in order to facilitate conversations with clients. The author had a client from Worms, Germany, which she thought was exciting (and funny) because of the Diet of Worms.[15] Of course, no one else who has been told about it finds it entertaining. The client, on the other hand, thought it was great that the author was familiar with the history of his small town.

Handling international custody, divorce, or kidnapping matters may be considered a sub-specialty within family law. However, issues arise that call for a basic knowledge of international law in everyday family law

practice. The first resource is not necessarily the New Jersey Statutes, the New Jersey Rules, or New Jersey case law. The first resource is likely to be the Internet to find an applicable treaty or other assistance. Compliance with international law may mean the difference between securing an enforceable final judgment for a client or a final judgment, which can be easily set aside. Recognizing that a local case has the potential of becoming an international case may afford practitioners the opportunity to provide clients and the parties' children extra protections when agreements are drafted. ■

ENDNOTES

1. The provision has been significantly truncated in the interest of the length of this article. *See also* Janet Johnston & Linda Girdner, *Family Abductors: Descriptive Profiles and Prevantation Inter-nations* (U.S. Dep't of Justice, OJJDP 2001 NCJ 182788) and http://travel.state.gov/family/.
2. State in this article refers to a country.
3. http://travel.state.gov/family/abduction/resources/resources_554.html.
4. http://travel.state.gov/family/family_1732.html.
5. 42 U.S.C. §11605 (1995).
6. The author cautions practitioners not to use translation services provided free on the Internet, unless the practitioner has a level of competency in the language. These translations are generally inaccurate and require a substantial amount of revision.
7. http://www.missingkids.com.
8. Office of International Judicial Assistance, Civil Division, Department of Justice, Todd Building, Room 8102, 550 11th Street N.W., Washington D.C. 20530, (2020) 307-0983. *See also* http://travel.state.gov/judicial_assistance.html.
9. *MacKinnon v. MacKinnon*, 191 N.J. 240 (2007).
10. The author is co-counsel with Michelle D'Onofrio and Krista Haley, of DiFrancesco, Bateman, Coley, Yaspin, Kunzman, Davis, and Lehrer, P.C., on the petition for *certiorari*.
11. *Baures v. Lewis*, 167 N.J. 91 (2001).
12. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
13. *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1878).
14. *Schaffer v. Heitner*, 433 U.S. 186 (1977).
15. At the Diet of Worms the Holy Roman Emperor issued the Edict of Worms on May 25, 1521, declaring Martin Luther an outlaw and a heretic and banning his literature.

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