



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: SW:MAP:Family:554777
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25 July 2011

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Ms Dennett

Re: Inquiry into International Child Abduction to and from Australia

Thank you for your invitation to the Law Society of New South Wales to make a submission to this parliamentary inquiry. The Terms of Reference were referred to the expert practitioner representatives on the Law Society's Family Issues Committee (Committee), whose members provide the following submissions:

(a) the costs, terms and conditions of legal and departmental assistance for parents whose child has been abducted overseas;

Court matters involving international child abduction are few in number, specialised in knowledge and complex because they inherently cross multiple jurisdictions. An underlying principle of this area of law is also that the child is returned to a jurisdiction and not necessarily to a particular parent.

Consequently, it is unreasonable to place the burden on a left behind parent in Australia to arrange for the conduct of legal matters while dealing with the emotional strain of the conduct of the matter in an overseas court.

Legal work associated with the return of a child to this jurisdiction should therefore be undertaken by the Central Authority. It should be undertaken promptly, by a lawyer readily accessible to the left behind parent and at no cost to the left behind parent. The lawyer should however remain the representative of the Central Authority rather than the representative of the left behind parent who may (but need not) appoint at their own cost a legal representative to assist in the application for the return of the child. This separation allows the Central Authority's lawyer to be a model litigant and take instructions from the Central Authority which are appropriate for the return of the child to the jurisdiction.

This also recognises that the Central Authority may act at a later stage on behalf of the abducting parent in the event that he or she makes an application for access to the child once the child returns to NSW.

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In addition to legal representation the Central Authority should also provide the assistance of a social worker to the left behind parent. At present this is undertaken by trained social work staff at International Social Services.

Significant legal costs may also be incurred in the jurisdiction that the child has been taken to or retained in, as that is where a judicial determination will be required of whether the circumstances of the removal/retention come within the *Convention on the Civil Aspects of International Child Abduction 1980*. Under Article 26, a country acceding to the Convention can elect to make a reservation that it will not be bound to meet the costs of the legal representation.

If a country has made such a reservation then the Central Authority should, consistent with the principles set out above, have in place a system for meeting the cost of the proceedings incurred outside Australia. This funding could reasonably be subject to a means test as the representation in this instance will be to put before a foreign court the left behind parent's views rather than to intervene as a State seeking that a child the subject of its jurisdiction be dealt with by a court of this jurisdiction.

Apart from the cost hurdle there will be variations in practice for each country.

When dealing with other countries the Central Authority becomes a pivotal source of information as it deals with all applications leaving the Commonwealth of Australia. Providing information to a parent in Australia on the process abroad is an important aspect of case management. To provide an effective service to left behind parents it is important for the Central Authority to have a stable work force so that relationships are built with Central Authorities and the relevant personnel abroad. This allows information to be shared about the informal processes each country uses.

(b) the effectiveness of the Hague Convention in returning children who were wrongly removed or retained, to their country of habitual residence;

The general experience of family law practitioners confirms research studies that indicate that a high proportion of abducting parents are the victims of domestic violence with the consequence that the outcome of the court action may return the child to a situation of violence.

In consequence, the Convention is designed to return the child to the jurisdiction and not to a particular parent. This is predicated upon the domestic jurisdiction having responsibility to put in place sufficient orders and arrangements for the safety and welfare of the child and of any parent who is a victim of domestic violence. The situation is not resolved, and the child is certainly not assisted, by the child being hidden in an overseas jurisdiction separate from other family and friends.

The situation can be contrasted with abductions to non-Convention countries where there is little hope of resolution and few, if any, means of legal recourse for family members to retain some measure of contact.

To this extent the Convention has been effective in putting in place a legal framework in which disputes can be resolved. This is preferable to what exists outside of the Convention. However the legal framework should not be seen as a total solution but instead as just one part of a much larger framework needed to support these families.

The Convention is also limited in its effectiveness because a significant number of countries are not signatories.

(c) the roles of various Commonwealth departments involved in returning children who were wrongly removed or retained, to their country of habitual residence;

The Committee has no comment to make on the role of Commonwealth departments and agencies such as the Department of Immigration and Citizenship, the Department of Foreign Affairs and Trade, and the Australian Federal Police. Details of their respective roles can be obtained from the Commonwealth Central Authority.

International Social Services (ISS), an independent non governmental organisation has an International Parental Child Abduction Service. ISS receives funding from both the NSW Central Authority and Commonwealth Central Authority. The International Parental Child Abduction Service provides counselling and support for parents. It has been involved in helping parents resolve cases and has provided the NSW Central Authority and CCA with assistance in Convention matters, such as attending court to give evidence of services, facilitating contact between children and parents. The ISS has even been known to drive children to the airport to meet their parent who has arrived to take them home.

(d) policies, practices and strategies that could be introduced to streamline the return of abducted children;

The one single factor that would streamline the return of any abducted child would be to encourage as many foreign jurisdictions as possible to sign the Convention and then resource and fully implement the spirit of the Convention.

A significant proportion of the population in NSW is not able to rely on the Convention to provide a remedy. The percentage of the NSW residents' population born overseas increased from 24.0% in 1996 and 24.9% in 2001 to 25.6% in 2006. In that same year, the largest number of overseas-born residents came from the United Kingdom, followed by China, New Zealand, Vietnam, the Philippines, Lebanon and Italy.

China (apart from the Special Administrative Regions of Hong Kong and Macao), Vietnam, Philippines and Lebanon are not signatories. Australia has signed bi-lateral agreements with Egypt and Lebanon. While these agreements are the best that can be achieved at present, insofar as they are tools of dialogue, they do not provide a legal remedy to ensure the return of children abducted from Australia.

Greater awareness of the existence and limitations of the Convention will ensure that left behind parents seek appropriate remedies with minimal delay. This in turn will influence the outcome. If delay is avoided then airport alerts may present a real impediment to the actual removal of the child from Australia. Delay in taking appropriate steps also allows the abducting parent to plead the defence of acquiescence.

(e) any other related matters

(i) Criminal sanctions

There is from time to time the suggestion that parental abduction should be treated as a criminal offence. Historically, when the Convention was put in place the expectation was that the abductors would be fathers who happened to abduct children whilst having contact with the children. When the Convention first came into operation this was primarily the case.

At present, abducting parents are mainly mothers who feel that they have no other option but to return home to their families following a marital break up.

More often than not, there may be domestic violence or post natal depression with a mother feeling unsupported by the father following the birth of a child. In some cases there are cross cultural issues such as language barriers, a mother feeling homesick or needing her own family support.

Accordingly, child abduction is properly a matter for the family law system and should not attract criminal sanctions.

Criminalising child abduction may actually hinder a prompt return as the requesting country may seek undertakings from the requesting parent not to press a prosecution. Imposing criminal sanctions may force an abducting parent to take more extreme actions to remain undetected.

The primary purpose of the Convention is to secure a prompt return of children so that the court, where the children are habitually resident, can make parenting decisions.

From a child protection perspective, incarcerating the person who has primary care of a child will rarely be in that child's best interests and has the potential to destroy the future relationship between the child and the parent who requested their return.

Criminal sanctions force a separation of the child from the abducting parent who will often be the child's primary carer. It denies the Family Court the time to make a measured decision on which parent can best meet the needs of the child. Separation in such circumstances is traumatic for the child.

Finally, within the family law jurisdiction sanctions do exist, as they do in domestic law, for breach of Australian Parenting Orders.

(ii) Mediation

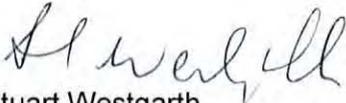
Recently, there has been a mediation pilot in cases involving New Zealand as the foreign jurisdiction. The use of a video link has been possible and this has proved particularly successful in resolving matters more expeditiously than might otherwise have been the case.

Mediation and other forms of alternate dispute resolution are increasingly and effectively used in family law matters and there is no reason why this should not also be the case in child abduction matters.

The practical issues of access to appropriate technology in the other jurisdiction and time differentials, while requiring extra planning in cross jurisdictional matters, should not be insurmountable.

I hope that you have found these comments useful. Should you require anything further, please contact Maryanne Plastiras, Policy Lawyer for the Family Issues Committee, on 9926 0212.

Yours sincerely


Stuart Westgarth
President