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When Custody Disputes Go Global: Applying the Hague Convention to Determine Jurisdiction

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The rapid globalization of the world economy has facilitated massive migration among nations. This flux has produced an ever-increasing number of marriages among people from different countries. One of the resulting corollaries is the transformation of otherwise simple custody disputes into jurisdictionally complex international quagmires.

Consider the following example of a complex international custody case. Prior to the marital discord, a couple resided with their minor son in New Jersey. This state was therefore the child's habitual residence. The parents had a falling out. The father then abducted his child from New Jersey to Canada. The left-behind-mother consults with a New Jersey attorney regarding her options to secure the return of the child to the state.

At first glance, the matrimonial attorney's perfunctory research reveals several legal options, including The Uniform Child Custody Jurisdiction Act, (UCCJA), N.J.S.A 2A:34-28 et seq. Because both Canada and the United States are signatories to the Hague Convention, the attorney is also likely to seriously consider the Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 51 Fed. Reg. 10494 (1986), as implemented by the International Child Abduction Remedies Act (ICARA), 42 U. S.C. 11601 et seq.

Slightly more in-depth research will uncover *Roszkowski v. Roszkowski*, a 1993 Chancery Division opinion that held New Jersey state courts have jurisdiction under the Hague Convention to order the return to the United States of children unlawfully abducted and detained in other countries. 274 N.J. Super. 620 (Ch. Div. 1993).

This article addresses the Hague Convention's application in New Jersey. It will critique the reasoning in *Roszkowski v. Roszkowski* and suggest that the opinion misconstrued the provisions of the convention. Although in appropriate circumstances New Jersey courts may have jurisdiction to determine international custody disputes and order the return of unlawfully detained children from abroad, they cannot do so on the basis of the Hague Convention.

Simply put, the convention confers exclusive jurisdiction in the courts of the foreign country where the child is unlawfully detained to order his or her return to the United States. In addition to examining in some detail the fallacy of *Roszkowski*, this article will guide New Jersey matrimonial practitioners into selecting the proper arsenal with which to effectively tackle international custody cases.

Roszkowski v. Roszkowski

To understand the flawed reasoning of Roszkowski, one must first consider the Hague Convention's explicit provisions and general purposes. Faced with the growing phenomenon of international child abductions and the attendant possibility of international political repercussions, the United Nations prepared the Convention on the Civil Aspects of International Child Abduction. The convention's paramount goal was to secure the prompt return of children wrongfully removed to or detained in any Contracting State. Convention Art. 1(a).

To date, the text of the Hague Convention has been adopted by more than 100 countries. The United States acceded to the convention on April 29, 1988. ICARA sets forth the procedures necessary to implement the convention in this country.

In Roszkowski, the court predicated its order for the return of a child wrongfully removed from the United States to Poland on the authority of the Hague Convention. In that case, the defendant/mother and her child came to the United States to live with the plaintiff/father. The parties and the child remained together in the United States for more than six months. Thereafter, the defendant mother sent the child back to Poland. Mr. Roszkowski filed a Superior Court action seeking custody of his daughter and her immediate return to the United States.

It is undisputed that the Roszkowski court had ample authority to adjudicate the custody issue. The court may even have had jurisdiction to order the return of the child from Poland under New Jersey law. See U.C.C.J. A. However, the court did not have jurisdiction to order the return of the child to this country under the Hague Convention. Pursuant to the mandate of the convention, the courts of Poland had exclusive jurisdiction to order the return of the abducted child.

The ICARA explicitly provides:

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a visitation action or by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed. 42 USC 11603(b) (emphasis added).

Accordingly, and consistent with Article 8 of the Hague Convention, any person seeking the return of a child from a contracting state may commence a civil action by filing a petition with a court or with the central authority located where the child is. See Convention Art.8

In the alternative, the petition may be filed with the central authority of the child's habitual residence, which will in turn forward the Hague petition to the central authority where the child is located. The petitioner bears the burden of showing by a preponderance of the evidence that the removal or retention was wrongful under Article 3. ICARA, 42 U.S.C. 11603(e)(1)(A), 2(A).

Now consider the previous example involving the wrongful removal of a child to Canada. Contrary to Roszkowski, under the convention the only court with authority to order the return of the child to the United States is a Canadian court. Similarly, in Roszkowski only the Polish courts had jurisdiction under the convention to order the return of the child to New Jersey.

In *Ivaldi v. Ivaldi*, the state Supreme Court had occasion to examine a separate but related issue decided by *Rozskowski* and disagreed with it. 147 N.J. 190 (1996). More specifically, relying on *Schmidt v. Schmidt*, 227 N.J. Super. 528 (App. Div. 1988), the high court held that the U.C.C.J.A. does not provide the Superior Court subject-matter jurisdiction to adjudicate international custody disputes. In *Ivaldi*, the justices held that *Schmidt* need not be read as restrictively as *Rozskowski* suggests and the jurisdictional provisions of the Act [in fact] apply to international custody disputes. 147 N.J. at 199, 203.

In *Alvarado v. Alvarado* an unreported decision involving the abduction of a child to Canada Passaic County Superior Court Judge George Sabbath held that New Jersey was the child's home state and ordered the child returned to the United States pursuant to the Uniform Child Custody Jurisdiction Act. Significantly, Sabbath refused to order the return of the child to New Jersey based on the Hague Convention, holding that the issuance of such an order lies within the exclusive province of the Canadian courts. Clearly, Sabbath refused to follow the reasoning in *Rozskowski* and plainly held that case was wrongfully decided. He wrote:

It is the opinion of this Court that the *Rozskowski* decision was contrary to the Hague Convention. Although the *Rozskowski* court may have been the court with jurisdiction to determine the custody issue on the merits, and may have had jurisdiction to order the return of the child from Poland under domestic law, see N.J.S.A. 9:2-2, 9:2-4 & 2A:34-28 et seq., it did not have jurisdiction to order the return of the child pursuant to the Hague Convention.

Sabbath further criticized the *Rozskowski* court's reliance on Article 29 of the Hague Convention. Article 29 provides that the left-behind parent may file an action directly with a court in the contracting state where the abducted child is physically located, not in the left-behind-parent's contracting state. Sabbath noted that authorities within the meaning of Article 29 refer to the appropriate authorities where the wrongfully retained, or removed, child is physically located. In the case of *Rozskowski*, that was Poland, not New Jersey.

The *Alvarado* court's holding is consistent with the convention's general aim of achieving legal certainty through respectful reciprocity and extremely close cooperation among the judicial and administrative authorities of its signatory countries. Elisa Perez-Vera, Explanatory Report, Hague Convention on Private International Law, 3 Acts and Documents of the Fourteenth Session, Par. 35 (1982). The Perez-Vera Report is recognized as the official reporter of the convention. *Levesque v. Levesque*, 816 F. Supp. 662, 664 (D. Kan. 1993).

This cooperation rests on the uncompromising notion of reciprocal rights and duties among the central authorities. *Id.* The convention fosters legal uniformity. It provides a homogeneous set of rules and allocates specific enforcement mechanisms to specific jurisdictions to eliminate the chaos inherent in possibly conflicting decrees issued from the courts of two different countries involving the same dispute and parties. Sabbath recognized that *Rozskowski* undermines the core of this principle and erodes the very foundation of the convention's meticulous organization.

It behooves every prudent practitioner faced with an analogous problem to recognize the flaw of *Rozskowski*, for that decision is ripe for reversal. Putting all of one's eggs into the *Rozskowski* basket is likely to endanger a litigant's chances to obtain the speedy return of his or her abducted child from abroad. Even if the trial court mistakenly follows *Rozskowski*, the appeals court may legitimately refuse to also do so.

Thus, the petitioner is likely to incur significant additional expense and lose precious time in re-litigating the issue before the trial court on the heels of a reversal or remand. Given the Hague Convention's stringent time limitations, the delay occasioned by a successful appeal may be catastrophic for the left-behind-parent. Therefore, the attorney would do well to consider implementing a farsighted litigation strategy designed to persuade and empower a foreign court to order the child's return under the convention.

How To Proceed

First, practitioners should immediately commence an action on behalf of the left-behind-parent in the Chancery Division of the child's (and presumably but not necessarily the parties') last county of residence in New Jersey. The timing of this action is critical, and the complaint should be filed at the earliest possible opportunity following the removal of the child to a foreign jurisdiction.

To successfully invoke jurisdiction under the U.C.C.J.A., the action should be commenced no later than six months from the date of removal. See N. J.S.A. 2A:34-31(1). The convention also provides significant hurdles to any Hague application if a period of one year or more elapsed from the date of the wrongful removal. Convention, Art. 13(a).

The New Jersey action seeking custody and the immediate return of the child should be predicated on the U.C.C.J.A. or other domestic law. See, e. g., N.J.S.A. 9:2-2 (the so called anti-removal statute); N.J.S.A. 9:2-3 (empowering the court to make custody determinations and other orders concerning the child where the parents live separately or are about to do so); and N.J.S.A. 9:2-4; 2A:34-23.

The well-pleaded complaint should also include a count under the convention. The relief sought therein must be limited to a declaratory judgment that the removal of the child was wrongful within the meaning of Article 3 of the convention. See *Morton v. Morton*, 982 F. Supp. 675, 688 (D. Neb. 1997) (state court has jurisdictional authority under the Hague Convention to establish wrongfulness under Article 3).

Hague Application Abroad

Simultaneous with or immediately after filing the New Jersey action, local counsel should coordinate with an attorney from abroad and arrange to file a Hague application under the convention in the country where the child has been taken. The New Jersey court's determination that the child was wrongfully removed or detained abroad may well be adopted by the court of the foreign jurisdiction, which is ultimately and exclusively empowered to order the return of the child to the United States. In fact, Article 15 of the convention provides, in relevant part, that

[t]he judicial authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention.

Assuming that the New Jersey action is successful in that it awards custody to the left-behind-parent, practitioners should also immediately coordinate with foreign counsel and arrange for the filing abroad of a separate application, independent of the Hague petition, seeking the recognition and enforcement of the New Jersey decree.

If notice and opportunity to be heard were provided to the defendant, the courts of the foreign country are likely to adopt this state's order and provide for its enforcement without re-litigating the underlying merits of the controversy. In these authors' experience, even the Eastern European, former communist block countries have accorded prior New Jersey judgements full recognition. First in time, first in right is a creed that even foreign courts seemingly adhere to.

When filing a foreign action for the enforcement of a New Jersey judgment abroad, to save critical time and to ensure maximum chances of success, the New Jersey attorney is well-advised to forward to counsel abroad certified copies of the New Jersey decree, which should also bear the seals of the New Jersey Department of State, the U.S. Department of State and that of the foreign country's local embassy or consulate, in that order.

Adhering to the steps and procedures suggested above best preserves the litigant's chances of having his or her child expeditiously returned to the United States.

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