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AFCC 56TH ANNUAL CONFERENCE –

MAY 29TH TO JUNE 1ST, 2019, TORONTO

Session Date: Thursday, May 30th, 2019

Workshop on Best Interests in Child Abduction Cases

Ontario Perspective: Road map for Family Lawyers Dealing with International Child Abduction Cases

Child abduction cases are not uncommon. Family law lawyers routinely get consulted by parents who are alleging that their child has been wrongfully removed or retained in another country, or who are accused or may be accused of wrongfully removing or retaining a child. These cases can be complex and are often incredibly time-sensitive. In dealing with these cases courts need to balance the interests of both parents and the children. In Canada, the balance has shifted in recent jurisprudence in favour of a more nuanced response to children's best interests and their expressed wishes. This evolution of child abduction law presents new challenges for counsel in Ontario with a greater need for consideration of how to obtain and use children's evidence. It is important that all practitioners have a basic understanding of what steps to take, or at least to consider when acting for a client in these cases.[1]

The steps to take will depend on whether the countries are signatories to the *Convention on the Civil Aspects of International Child Abduction* ("*Hague Convention*"). There are currently 99 countries that are signatories to the Hague Convention. Canada is included in this list. The Hague Convention is implemented in every province and territory across Canada. If the other jurisdiction at issue is also on the list of signatories, then the Convention will apply. The comments in this paper are focussed on child abduction law and its application in the Province of Ontario.

Where both countries are signatories to the Hague Convention

Time is not on your side in these cases. Your client needs to act quickly in order to avoid questions as to the child's habitual residence and parental acquiescence. If you are running

[1] See also the useful publication on the Government of Canada website regarding the steps to take in these case , https://travel.gc.ca/travelling/publications/international-child-abductions#seeking.

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close to a year since the child was removed/retained, then you also need to be mindful of Article 12 that provides a court with discretion not to order the return of the child even if that removal was wrongful where the child is settled in his or her new environment.

<u>Steps to take when acting for the left behind parent</u>

1) Try to negotiate the child's voluntary return

You or your client should try and secure the voluntary return of the child directly with the other parent or his/her lawyer, if any. At the same time, you should be considering whether to start an application for the child's return under the *Hague Convention*. Such an application is distinct from a custody application.[2] Rather, an application under the *Hague Convention* is strictly geared towards a resumption of the status quo arrangement before the child's wrongful removal/retention by way of an order that the child be returned.

2) Consider whether to bring an application for the child's return under the Hague Convention

Before an application can be brought under the Hague Convention, the child must be under the age of sixteen[3] and the removal or retention of the child must be considered "wrongful" in accordance with Article 3. This Article reads as follows:

> The removal or the retention of a child is to be considered wrongful where:
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> (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 rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

[2] See Article 19, which states: "A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."
[3] Article 4.

Thus, the preconditions that need to be met before the Convention will apply requires that the requesting parent establish the following:

1. The child's habitual residence at the time of the alleged wrongful removal/retention was the state of the parent seeking the child's return;
2. The removal/retention was in breach of the rights of custody under the law of the state where the child was habitually resident at the time of the alleged wrongful removal/retention; and
3. The rights of custody were being exercised at the time of removal/retention or would have been exercised but for the removal/retention.

Precondition #1: the child is habitually resident in the state of the requesting parent

In Canada, the law surrounding a child's habitual residence under the Convention was subject to a major overhaul in the Supreme Court of Canada's majority decision in ***Office of the Children's Lawyer v. Balev***.[4] In this decision, the majority adopted a hybrid approach to determining a child's habitual residence. This approach examines all of the relevant circumstances, including the intentions of the parents and also the child's acclimatization in a given country. The Honourable Justice McLachlin for the majority described the considerations under the hybrid approach as follows:

> 43 On the hybrid approach to habitual residence, the application judge determines the focal point of the child's life — "the family and social environment in which its life has developed" — immediately prior to the removal or retention: Pérez-Vera, at p. 428; see also Jackson v. Graczyk (2006), 45 R.F.L. (6th) 43 (Ont. S.C.J.), at para. 33. The judge considers all relevant links and circumstances — the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B.
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> 44 Considerations include "the duration, regularity, conditions and reasons for the [child's] stay in the territory of [a] Member State" and the child's nationality: Mercredi v. Chaffe, C-497/10, [2010] E.C.R. I-14358, at para. 56. No single factor dominates the analysis; rather, the application judge should consider the

[4] *Office of the Children's Law v. Balev,* 2018 SCC 16 (S.C.C.) at para 42.

entirety of the circumstances: see Droit de la famille — 17622, at para. 30. Relevant considerations may vary according to the age of the child concerned; where the child is an infant, "the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of": O.L. v. P.Q. (2017) C-111/17, (C.J.E.U.), at paras. 43-45.

45 The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children: see Mercredi, at paras. 55-56; A. v. A. (Children) (Habitual Residence), [2013] UKSC 60, [2014] A.C. 1 (U.K. S.C.), at para. 54; L.K., at paras. 20 and 26-27. However, recent cases caution against over-reliance on parental intention. The Court of Justice of the European Union stated in O.L. that parental intention "can also be taken into account, where that intention is manifested by certain tangible steps such as the purchase or lease of a residence": para. 46. It "cannot as a general rule by itself be crucial to the determination of the habitual residence of a child ... but constitutes an 'indicator' capable of complementing a body of other consistent evidence": para. 47. The role of parental intention in the determination of habitual residence "depends on the circumstances specific to each individual case": para. 48.

46 It follows that there is no "rule" that the actions of one parent cannot unilaterally change the habitual residence of a child. Imposing such a legal construct onto the determination of habitual residence detracts from the task of the finder of fact, namely to evaluate all of the relevant circumstances in determining where the child was habitually resident at the date of wrongful retention or removal: see In re R. Children [2015] UKSC 35, [2016] A.C. 76, at para. 17; see also A. v. A, at paras. 39-40.

47 The hybrid approach is "fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions": Redmond v. Redmond, 724 F.3d 729 (7th Cir. 2013), at p. 746.

> It requires the application judge to look to the entirety of the child's situation. While courts allude to factors or considerations that tend to recur, there is no legal test for habitual residence and the list of potentially relevant factors is not closed. The temptation "to overlay the factual concept of habitual residence with legal constructs" must be resisted: A. v. A., at paras. 37-39.[5]

The inquiry focuses on the time immediately prior to the wrongful removal/retention. Subsequent connections a child may form to the new jurisdiction is only relevant when you come to the exception for a child's return under Article 12.[6]

Precondition #2: the removal/retention is in breach of rights of custody in the state of the requesting parent

The Convention defines "rights of custody" in Article 5 as follows:

> "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.

Where there is no court order or agreement in place, the court will look to the laws surrounding custody and access in the child's habitual residence to determine whether the removal or retention violated a right to custody. The Supreme Court of Canada addressed this requirement in ***Thomson v. Thomson*** when the Honourable Justice La Forest for the majority stated as follows:

> Custody, as understood by the Convention, is a broad term that covers the many situations where a person lawfully has the care and control of a child. The breach of rights of custody described in art. 3, it will be remembered, are those attributed to a person, an institution or any other body by the law of the state where the child was habitually resident immediately before the removal or retention. Article 3 goes on to say that custody may arise by operation of law. The most obvious case is the situation of parents exercising the ordinary care and control over their child. It does not require any formal order or other legal document,

[5] *Ibid* at paras 43-47.
[6] *Ibid* at para 67.

> although custody may also arise by reason of a judicial or administrative decision, or by agreement.[7]

In Ontario, the court can take judicial notice of the law and judicial or administrative decisions from the courts of the requesting state without the need for formal proof.[8] Article 15 allows the court in the state requested to return the child to ask the court in the requesting state to determine under its domestic laws whether the removal or retention was wrongful within the meaning of the Convention.

Even if there is a court order in place granting the removing parent custody of the child, the retention may still be wrongful in certain circumstances. In the situation of the final order, the court has to consider whether the order of sole custody in favour of the removing parent granted him or her carte blanche to determine the residence of the child. For instance, the court may consider the presence of a non-removal clause in the final order or the governing legislation in the requesting state in terms of the rights assigned to custodial parents and whether those rights include the ability to determine the child's place of residence.[9]

In the situation of an interim order, the court retains jurisdiction to determine the place of residence of the child, not the interim custodial parent.[10] As such, the court is an institution within the meaning of Article 3 that can exercise rights of custody. This may be true regardless of whether there is a non-removal clause in the interim order.[11]

The definition of "rights of custody" as set out in Article 5 makes it clear that a breach merely of access rights would not meet the requirements under Article 3.[12] Article 21 of the Convention can be used by access parents to have the requested state assist in the left behind parent's efforts to exercise access to the child. Article 21 expressly stipulates that the central authority of the requested state is bound to cooperate and promote the peaceful enjoyment of access rights.

Precondition #3: the requesting parent was exercising his or her custody rights at the time or removal/retention, or would have been doing so but for the removal/retention

This precondition tends to set a fairly low bar for the left behind parent. That parent must merely show that prior to the child's removal or retention, he or she kept or tried to keep some sort of regular contact with the child. Any attempt to maintain a somewhat regular relationship with the

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[7] *Thomson v. Thomson*, 1994 CarswellMan 91 (S.C.C.) at para 48.
[8] *Solem v. Solem*, 2013 ONSC 1097 (SCJ) at para 46.
[9] *Thorne v. Dryden-Hall*, 1997 CarswellBC 1126 (BC COA) at paras 9 and 27.
[10] *Ibid* at paras 66-68; *Johnson v. Jessel*, 2012 BCCA 393 (BC COA).
[11] *Lombardi v. Mehnert*, 2008 ONCJ 164 at para 19 (OCJ).
[12] *Ibid* at para 50.

child should be sufficient to meet this test.[13] However, where the left behind parent merely visits with the child on occasion and does not demonstrate the "stance and attitude" of a parent, this precondition will not be met.[14]

3) Consider where to bring your Hague Application

Once you've determined that your client meets the preconditions as listed above, you need to decide where you are going to bring your application. The application can be made to a court or central authority the child's habitual residence or to the central authority or court of the country where the child is because of the alleged wrongful removal/retention.[15] Usually the most effective approach is to proceed in court in the jurisdiction in which the child is physically present. To proceed first in the jurisdiction from which the child has already been removed merely creates further opportunities for delay.

Ontario has its own central authority, as does every Canadian province has its own central authority.[16]

4) Retain or consult with a lawyer in the other jurisdiction

Regardless of where you decide to bring your application, you should immediately consider retaining a family lawyer in the other jurisdiction. This will not only be of assistance in terms of serving your application on the other party, but in negotiating with the other party and understanding and obtaining evidence of the laws surrounding custody and access in that jurisdiction. If there is not already a family court proceeding in the home jurisdiction, your client should consider initiating one.

5) Push the Application forward be setting a hearing date and gathering all of your evidence

The Convention contemplates a speedy process for the return of a child that has been wrongfully removed or retained.[17] Often decisions are made based on a summary procedure and written evidence. You should push for a hearing date as soon as possible.

Cross-examination on affidavit evidence is possible and should be requested where you think it will help your client's case. You should also consider whether oral testimony from your client

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[13] See *Wedig v. Gaukel*, 2007 CarswellOnt 2479 (SCJ) at paras 62-67 for a discussion of the test for establishing "exercise".

[14] *Jackson v. Graczyk*, 2007 ONCA 3888 (OCA) at paras 40-47. In this case, the COA found that the father was not exercising rights of custody at the time of the removal of the child. He lived in a difference jurisdiction (Texas versus Florida), visited infrequently, paid little support and was never alone with the child.

[15] See Articles 8 and 29.

[16] Canada Country Profile < https://www.hcch.net/en/publications-and-studies/details4/?pid=5368&dtid=42>

[17] See Article 2 that requires the requested state to "use the most expeditious procedures available" and Article 11 that requires the court in the requested state to "act expeditiously in proceedings for the return of the child".

or a third party would advance your theory of the case. If so, a formal request will need to be made to the court.

6) Consider what additional claims you want to make in your Hague Application

In addition to simply ordering the immediate return of the child, you may want to consider some of the other following claims:

- Securing the child: it is wise to seek orders securing the child's passport and identity documents and any other order needed to prevent the child being removed out of Ontario to a third jurisdiction by an absconding parent. Be careful to consider any possible jurisdiction in which the child may have citizenship for which the parent could obtain travel documents. If a child has a right to more than one citizenship it is not enough to secure his or her Canadian passport.
- Timeline for the child's return: rather than simply state "immediate return", it is better to seek a specific time limit for the child's return. For instance, you may wish to request an order that the child be returned within 7 days from the date of the order. You may also want to request that a travel itinerary, including flight information be provided within a shorter timeframe so that your client can track the flight and know as soon as possible when he or she can expect the child to be returned.
- Police enforcement: this may be necessary in order to ensure compliance with any order for the child's return. If you have brought the application in the requesting state, you should ensure you have spoken to a local lawyer in the other jurisdiction about the necessary language in the court order to ensure proper enforcement in both jurisdictions.
- Cost of the return flight and reasonable travel expenses: you may wish to include a request that the abducting parent pay these costs to avoid any confusion or issue in the future.

Steps to take when acting for the allegedly abducting parent

1) Consider whether to wait and see if the left behind parent is going to seek the child's return

Time is of the essence in terms of the left behind parent taking legal action for the child to be returned. The longer that parent delays, the better off your client's chances may be of being able to stay in the new jurisdiction with the child. It may be in the removing or withholding parent's best interests not to do anything until you are being faced with the threat of a legal claim for the child's return.

2) Initiate an Application for custody and primary residence in your jurisdiction

If it seems likely that the left behind parent is going to commence a Hague application, you may want to consider commencing an application for custody and primary residence of the child in Ontario if there is a credible claim for jurisdiction in this province.

3) Consider whether the parent has established the preconditions for wrongful removal or retention under Article 3 of the Convention

These preconditions are outlined in the prior section.

4) Consider whether any of the exceptions to a child's return under the Convention apply in the circumstances of your case

If the requirements of Article 3 have been established, then a judge must order the prompt return of the child unless certain exceptions are found to apply. These exceptions were summarized by the majority decision in the Supreme Court of Canada in ***Office of the Children's Lawyer v. Balev*** as follows:

> 1) The parent seeking return was not exercising custody or consented to the removal or retention (Article 13(a));
>
> 2) There is grave risk that return would expose the child to physical or psychological harm or place the child in an intolerable situation (Article 13(b));
>
> 3) The child of sufficient age and maturity objects to being returned (Article 13(2));
>
> 4) The return of the child would not be permitted by fundamental human rights and fundamental freedoms of the requested state (Article 20); and,
>
> 5) The application was brought one year or more from the date of wrongful removal or retention, and the judge determines the child is settled in the new environment (Article 12).[18]

Your client has the onus of establishing one or more of the exceptions above based on a balance of probabilities.

The left behind parent was not exercising custody or consented to the removal or retention – Article 13(a)

If the left behind parent has already established that he or she was exercising rights of custody at the time of the wrongful removal or retention sufficient to trigger application of the Convention, the abducting parent is going to have a hard time raising any arguments about a failure to exercise custody rights.

[18] 2018 SCC 16 (S.C.C.) at para 29.

The more likely argument will be that the left behind parent consented or acquiesced to the removal or retention of the child.
Consent can be explicit or implied. It does not need to be in writing and can be inferred based on the conduct of the parties.[19] Acquiescence has been defined as "subjective consent that is determined by words and conduct, including silence."[20]
Clear and cogent evidence of this consent or acquiescence is required. For instance, in terms of acquiescence, this could be evidence of conduct on the part of the left behind parent that is inconsistent with the immediate return of the child to his or her habitual residence or evidence that the left behind parent allowed enough time to pass without seeking the child's immediate return.[21]

Grave risk of harm or intolerable situation if the child is returned – Article 13(b)

There is a high bar to meet in order to fall within this exception. This exception is generally given a narrow interpretation by the courts. In order to meet this exception, both the risk and the harm must be substantial and serious.[22] There must be harm to an intolerable degree. While the threshold is a high one, it should not be set to such an impossible standard that results in children being returned to a situation that may cause them long-term damage. This was made clear by the court in ***Husid v. Daviau*** with the following statement:

> Children are capable of tolerating all manner of abuse without apparent damage, and not always do they bear long term consequences from it. It would be strange for a treaty that declares the interests of children to be "of paramount importance" to require that children be at grave risk of being pushed beyond the limits of endurance before the court could decline an order for return. Fortunately more recent cases have adopted a more humane standard that nevertheless sets a high threshold for "intolerable situation": it is "a situation which this particular child in these particular circumstances should not be expected to tolerate": Re E (children), [2011] UKSC 27, at par. 34; see also DT v. LBT, [2010] EWHC 3177 (Fam), at par. 23.[23]

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[19] *Zimmerhansl v Zimmerhansl*, 2001 ABQB 589 at para 33.
[20] *Katsigiannis v Kottick-Katsigiannis*, 2001 CarswellOnt 2909 (OCA) at para 48.
[21] *Ibid* at paras 49 to 56.
[22] *Pollastro v. Pollastro*, 1999 CarswellOnt 848 (OCA) at para 23; Courtney v. Springfield, 2008 CarswellOnt 4263 (SCJ) at para 30.
[23] *Husid v Daviau*, 2012 ONSC 547 (SCJ) at para 103, affirmed in 2012 ONCA 655

Keep in mind that a grave risk of harm to your client can establish a risk to the child as well.[24] Harm is to be viewed from the child's perspective, regardless of the source. If the harm is significant enough to meet the high threshold under this exception, the source of this harm should not be a relevant consideration.[25]

In addition to showing a grave risk of harm or intolerable situation, your client will also have to demonstrate that the requesting state is unwilling or unable to adequately mitigate the risk and protect the child.[26] As noted in ***Husid v. Daviau***, "[t]here is a presumption that the courts of the child's home jurisdiction will be able to make arrangements that will protect a child from harm if the child is returned there", however, this presumption can be rebutted by your client showing that no such arrangements can be made or will not be effective.

Clear and compelling evidence is needed in order to meet the threshold under this exception. You will need to marshal all relevant evidence of harm or intolerable situation as soon as possible. You should look beyond simply your client's evidence and consider whether there is reliable evidence from other sources, such as third parties, who may be able to corroborate your client's claims.

You should consider whether any undertakings should be made by the left behind parent in the event your client is unable to meet the stringent test under this exception. For instance, if your client is the primary parent for the child and there are concerns about the impact on the child from being placed with the left behind parent, a court can require that the left behind parent undertake not to take physical custody of the child upon his or her return to the requesting state.[27] Similarly, if you act for the left behind parent and you are facing a risk that a court may not order the child's return under this exception, you should consider what undertakings your client could make to mitigate the risk of harm.

The child is of sufficient age and objects to being returned – Article 13(2)

This discretionary exception is based entirely on the objections of the child at issue. Your client must satisfy the court that 1) the child has reached an appropriate age and degree of maturity at which his or her views can be taken into account, and 2) the child objects to being returned to the requesting state.[28] Even if your client meets these two requirements, it is not automatic that the child will not be returned to the requesting statement. Rather, the court has discretion to determine whether or not to order the child's return and will often weigh the child's objections against the principles underlying the Convention.

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[24] *Zafar v. Saiyid*, 2018 ONCA 352 (OCA) at para 18.
[25] *Thomson v. Thomson*, supra (SCC) at para 81.
[26] *DR v AAK*, 2006 ABQB 286 at para 222; *Husid v. Daviau*, supra at para 99.
[27] For instance, see *Thomson v. Thomson, supra* and *Cannock v. Fleguel*, 2008 ONCA 758 at para 27.
[28] *Office of the Children's Lawyer v. Balev,* supra (SCC) at para 77.

In Canada, this exception was recently subject to consideration by the highest court in ***Office of the Children's Lawyer v. Balev***, where Justice McLachlin in writing for the majority of the Supreme Court of Canada made the following statements:

> Although much ink has been spilled on precisely what must be shown, it is telling that the Hague Convention does not specify particular requirements or procedures to establish sufficient age and maturity and an objection. Basically, it is for the application judge to determine, as a matter of fact, whether those elements are established. In most cases, the object of Article 13(2) can be achieved by a single process in which the judge decides if the child possesses sufficient age and maturity to make her evidence useful, decides if the child objects to return, and, if so, exercises his or her judicial discretion as to whether to return the child.
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> Determining sufficient age and maturity in most cases is simply a matter of inference from the child's demeanor, testimony, and circumstances: see Thompson, at para. 17; England v. England, 234 F.3d 268 (5th Cir. 2000), at pp. 273-74, per DeMoss J., dissenting; M. Fernando and N. Ross, "Stifled Voices: Hearing Children's Objections in Hague Child Abduction Convention Cases in Australia" (2018), 32 Int'l J.L. Pol'y & Fam. 93, at pp. 102-3. In some cases, it may be appropriate to call expert evidence or have the child professionally examined: see S. (J.) v. M. (R.), 2013 ABCA 441, 566 A.R. 230 (Alta. C.A.), at paras. 25-26; Greene, at pp. 127-28. However, this should not be allowed to delay the proceedings.
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> As in the case of age and maturity, the child's objection should be assessed in a straight-forward fashion — without the imposition of formal conditions or requirements not set out in the text of the Hague Convention.
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> If the elements of (1) age and maturity and (2) objection are established, the application judge has a discretion as to whether to order the child returned, having regard to the "nature and strength of the child's objections, the extent to which they are 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds

> with other considerations which are relevant to her welfare, as well as the general Convention considerations": In re M., at para. 46.[29]

There is conflicting case law on what constitutes an "objection" under this exception.[30] The regular meaning of "objects" would suggest an expression of disapproval or opposition.[31] It should go beyond simply a preference to remain in the requested state with your client. The court will also consider the reason for the child's objection, the independence of the objections and whether the child is objecting to returning to the requesting state or simply objecting to returning to the care of the left behind parent.

In order to fall into this exception, you may need independent evidence of the child's objections. If your client and the child are in Ontario, you should consider requesting the involvement of the Office of the Children's Lawyer on an expedited basis to either provide legal representation to the child or complete a clinical investigation or voice of the child report. A court will not make this appointment if it thinks it will unnecessarily delay the hearing of the application given its obligations under the Convention to act promptly to return a child to his or her habitual residence. Other options would be to consider the child's own testimony or a judicial interview.

Return of the child would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms – Article 20

This exception is not often pleaded. Rather, in most cases, a parent may make a claim under Article 13(b) instead regarding the child's grave risk of harm or intolerable situation if forced to return. This Article has been successfully claimed in cases involving a child who has been granted refugee status in Canada.[32]

More than a year has elapsed and the child is now settled into his new environment – Article 12

The clock for the wrongful removal begins to run the date on which the child was taken to the new jurisdiction. In the case of a wrongful retention, the clock begins to run the date the child ought to have been returned.

This exception recognizes that a longer a child lives in his or her current environment, the greater the possibility that he or she will be negatively impacted by a return order. In certain

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[29] *Ibid* at paras 79-81.
[30] See *Garelli v. Rahma*, 2006 CarswellOnt 2582 (SCJ) at paras 35-36 for a brief discussion of this case law.
[31] *Ibid* at para 36.
[32] *I(AMR) v. R(KE),* 2011 ONCA 417 (OCA) at para 71; *Borisovs v. Kubiles*, 2013 ONCJ 85 (OCJ) at para 48. It should also be noted that in such cases, the criteria for the grave risk of harm is also found to be met.

circumstances, the interests of the child in not being uprooted from his or her current environment will outweigh the need to protect the child from abduction.[33]

To determine if a child is "now settled" in his or her new environment involves a child-centric factual inquiry into the child's actual circumstances.[34] This includes factors such as the child's home, school, friends, activities, extended family, opportunities and overall connection and integration into the new environment. Factors external to the child, such as the removing parent's behaviour and conduct in abducting the child are only relevant in the context of the policy objectives of the Convention. These objectives, which include deterrence, restoration of the status quo and prompt return[35] must be weighted against the child's factual integration into the new setting in determining whether to order the child's return based on this exception.

Clear and compelling evidence of the child's settlement in the new environment is required. You should consider whether there is independent evidence that may corroborate your client's evidence. For instance, a child's report cards, letters confirming enrollment in extra-curricular activities, affidavits from third parties who have contact with the child.[36]

5) Consider and organize the evidence you will need to support your client's position as soon as possible

The left behind parent will likely be pushing the matter to an early hearing date. You need to make sure that you consider the evidence you will need to properly advance your client's position. You need to consider whether you want to present oral evidence at the hearing or cross-examination on affidavit evidence. Given that these matters are typically adjudicated in a summary manner based on written evidence, leave of the court will be required should you wish to have oral evidence presented at the hearing.

Where child is in a country that is not a signatory to the Hague Convention

Steps to take when acting for the Ontario resident left behind parent

1) *Retain or consult with a lawyer in the other jurisdiction*

Child abduction cases involving non-signatory states are by their nature difficult cases. Your efforts to recover the child will depend in large part on the receptivity, or lack, of the state to which the child has been taken. That state may not recognize parental child abduction as a crime, may not have courts that are prepared to respect or recognize Canadian orders, or lack

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[33] *Kubera v. Kubera,* 2010 BCCA 118 at para 38.
[34] *Ibid* at paras 40 to 48.
[35] E.g. see *A(J.E.) v. M(C.L.),* 2002 NSCA 127 (NS COA) at para 31
[36] See *Bielawski v. Lozinska*, 1997 CarswellOnt 2923 (OCJ – Prov Div) at para 17 for a clear statement about the evidentiary onus.

willingness or ability to find and protect the children.[37] Virtually no jurisdiction outside Ontario has as expansive a definition of parentage so a first hurdle may be that your client is not recognized as a parent in a foreign state.[38]As a first step it is helpful to try to locate a reputable family lawyer in that jurisdiction in order to determine what the legal framework is and whether there are any effective remedies in that jurisdiction.

2) *Initiate an application in Ontario*

You should consider immediately initiating an application in Ontario. If your client already has a custody order you should seek an order for return of the child and you may also seek a finding of contempt. If your client only has an access order you should seek an order transferring custody. If your client does not have any existing parenting orders, you should initiate an application for custody as well as return of the child. An application can be made under the *Divorce Act,* if it applies, or the *Children's Law Reform Act* if the parents are not married or do not have the requisite residency in Canada required to initiate a divorce application.[39] Once you have an Ontario order for the return of the child your client can attempt to obtain a mirror order in the foreign jurisdiction, if that is possible.

<u>Steps to take when a child has been brought by a parent to Ontario from a non-signatory state</u>

1) Start a court Application in Ontario

These applications are often initiated under the *Children's Law Reform Act* as they commence before the Ontario based parent has acquired the requisite one year residency to initiate a divorce. Under s. 22 of the *Children's Law Reform Act*, Ontario courts have jurisdiction not only when a child is habitually resident in the province[40] but also in certain other circumstances. The main test for an Ontario court to take jurisdiction over a custody or access application for a child who is not habitually resident in the province is that the court is satisfied that:

a. The child is physically present in Ontario at the commencement of the application for the order;

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[37] https://travel.gc.ca/travelling/publications/international-child-abductions#If_the_Hague_Convention_Does_Not_Apply
[38] *Children's Law Reform Act*, R.R.O. 1990, c.12, ss. 4-15
[39] *Divorce Act, R.S.C. 1985, c.3 (2nd Supp.), ss. 3(1), 4(1), and 6*
[40] *Children's Law Reform Act*, s. 22(1)(a)

b. That substantial evidence concerning the best interests of the child is available in Ontario;
c. That no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident;
d. That no extra-provincial order in respect of custody of or access to the child has been recognized by a court in Ontario;
e. That the child has a real and substantial connection with Ontario; and
f. That, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario.[41]

Children's best interests are not a factor to be considered under s. 22 of the *Children's Law Reform Act*.[42] However, questions of jurisdiction are subject to the overall statutory purposes of the act which include:

a. to ensure that custody and access applications will be determined on the basis of the children's best interests;
b. to avoid the concurrent exercise of jurisdiction by tribunals in different places;
c. to provide that other than in exceptional circumstances an Ontario court will decline jurisdiction where there is a tribunal in another jurisdiction with which the child has a closer connection;
d. to discourage child abduction;
e. to provide for effective enforcement of custody and access orders and for the recognition of those orders made outside Canada.[43]

Under the *Children's Law Reform Act* it is still possible for an Ontario court to take jurisdiction even if the parent cannot meet the requirements of s. 22 of the Act if the child is physically present in Ontario and the court is satisfied on a balance of probabilities that the child would suffer serious harm if:

a. The child remains in the custody of the person legally entitled to custody of the child,
b. The child is returned to the custody of the person legally entitled to custody of the child, or
c. The child is removed from Ontario.[44]

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[41] *Children's Law Reform Act,* s. 22(1)(b). This is a conjunctive test. The applicant must satisfy all six requirements.
[42] *Ojeikere v. Ojeikere*, 2018 CarswellOnt 5917 (O.C.A.) at para. 15
[43] *Children's Law Reform Act,* s. 19
[44] *Children's Law Reform Act*, s. 23

Where a court finds a risk of serious harm to the child "the aim of discouraging a child abduction must yield to…the best interests of the child."[45] The Ontario Court of Appeal has held that the standard for a finding of serious harm is less stringent under the *Children's Law Reform Act* than under article 13(b) of the *Hague Convention* based on the omission of the phrase "intolerable situation" from the provincial statute. Further, the Ontario Court of Appeal concluded that where the case concerns a non-signatory state we cannot have the same confidence that state will determine custody based on a child's best interests as for the signatory states.[46] This fact militates in favour of Ontario taking jurisdiction.

When assessing an allegation of risk of serious harm both physical and psychological harm is relevant. In weighing this factor, the Ontario court will consider the children's views. The strong views of a mature child that he or she does not wish to be returned to another country are given weight. To compel a child to return to another country against his or her wishes may cause psychological harm to the child. Such a finding is enough for a court to exercise its discretion under s. 23 to take jurisdiction and refuse to return the child.[47]

All questions of jurisdiction under the *Children's Law Reform Act* are discretionary in that a court may decline jurisdiction if there is a more appropriate jurisdiction outside Ontario.[48] Further, even if a parent cannot satisfy the court that it should take jurisdiction under ss. 22 or 23 of the Act, the statute also preserves the court's *parens patriae* jurisdiction.[49]

Prevention of Child Abduction

Family professionals need to be able to assess the risks of abduction and advise parents on what preventative steps can be taken to avoid abduction in appropriate cases. There are clear limitations to effective recovery of children through the Hague Convention and enormous barriers when the child is removed to a non-signatory country. Family professionals need to be alert to the red flags for potential child abduction such as where a parent has made threats of abduction, the child has multiple passports or citizenships, or a parent has resources and connections abroad while having weak connections to Canada. Parents need to consider securing passports and identification, obtaining supervised access orders where appropriate,

[45] *E.(H.) v. M.(M.)* 2015 ONCA 813 (O.C.A.) at para. 39
[46] *Ojeikere, supra*, at para. 59 and 60
[47] *Ojeikere, supra*, at para. 81-87
[48] *Children's Law Reform Act,* s. 25
[49] *Children's Law Reform Act,* s. 69

and obtaining mirror orders in foreign jurisdictions in which the child exercises access to the other parent. This last option is only effective for countries with a strong rule of law.[50]

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May 2019

[50] For an excellent survey of the problem and preventative options see: Victoria Starr "Preventing Parental Child Abduction – The Role of the Lawyer in Managing Risk" 32 CFLQ 137