

INTERNATIONAL CHILD ABDUCTION

SANDRA DAVIS

JEREMY

ROSENBLATT

TANYA GALBRAITH



Sweet & Maxwell

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By

SANDRA DAVIS

Partner, Mishcon De Reya Solicitors

JEREMY ROSENBLATT

Barrister, Gray's Inn Chambers

TANYA GALBRAITH

Solicitor, Charles Russell Solicitors

LONDON
SWEET & MAXWELL
1993

Published in 1993 by
Sweet & Maxwell Limited of
South Quay Plaza, 183 Marsh Wall,
London E14 9FT
Typeset by Tradespools Ltd., Frome, Somerset
Printed and bound in Great Britain by Butler and Tanner Ltd.,
Frome and London.

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**A catalogue record for this book is
available from the British Library**

ISBN 0 421 489901

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The index was prepared by Patricia Baker

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S. Davis, J. Rosenblatt, T. Galbraith
1993

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AUSTRALIA

The Law Book Company
Brisbane · Sydney · Melbourne · Perth

CANADA

Carswell
Ottawa · Toronto · Calgary · Montreal · Vancouver

Agents

Steimatzky's Agency Ltd., Tel Aviv;
N.M. Tripathi (Private) Ltd., Bombay;
Eastern Law House (Private) Ltd., Calcutta;
M.P.P. House, Bangalore;
Universal Book Traders; Delhi;
Aditya Books, Delhi;
MacMillan Shuppan KK, Tokyo;
Pakistan Law House, Karachi, Lahore

FOREWORD

International child abduction is a problem of immense emotional proportions and fraught with practical difficulties. It is on the increase. With the ease and frequency of foreign travel and relaxation of cross border control the upsurge in bi-national marriage and the consequent complications of children with dual nationality and two passports, the law has been hard-pressed to find a satisfactory solution.

With the ratification of the Hague and European Conventions on International Child Abduction, matters have improved dramatically; the percentage of abducted children returned by Contracting States is high. For the law to become even more effective, however, more countries need to sign and ratify.

Although reported cases on the subject are increasing, the busy practitioner who is faced with defending a case brought by a panel solicitor instructed by the Lord Chancellor's Department, is confronted with the unenviable task of learning on the spot with very little time in which to do it. This book is thus written for every family lawyer who comes across a case of international child abduction once in a blue moon. Knowing that she or he has to act speedily, it is designed to provide an easy reference guide to the practice and operation of the Conventions and the defences with supporting cases and precedents.

We do hope that it will prove helpful and will be an invaluable tool in familiarising family lawyers with the Conventions' procedures and application. As those practising in the field become more conversant with the workings, particularly of the Hague Convention, which is of real importance since it takes precedence in any case where it is applicable, it is to be hoped that this greater knowledge will be a powerful deterrent to potential abductors.

We wish to thank and acknowledge the following people:
Sandra Davis thanks Maggie Rae for all her helpful advice and positive encouragement; Jeremy Rosenblatt thanks Stella Sweetman and Gillian Morris for their invaluable support and guidance; and, Tanya Galbraith thanks her very patient husband, Jeremy, for all his support.

Introduction

On October 24, 1980 the Convention on the Civil Aspects of International Child Abduction was adopted by the 14th Session of the Hague Convention on private international law in Plenary Session and by unanimous vote of the States which were present. On the following day, October 25, 1980, the Final Act of the 14th Session which contained the text of the Convention and a Recommendation containing the model form to be used in applications for the return of children wrongfully removed or retained was signed. The Hague Convention came into being.

It is implemented in the United Kingdom by Part I of the Child Abduction and Custody Act 1985 which came into effect on August 1, 1986. This Act also has the effect of ratifying the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children. Where applications are made under both conventions, it is the Hague Convention which takes precedence.

The Hague Convention in particular provides family law practitioners with a powerful and effective weapon to combat the growing tide in international child abduction. The aim is to ensure the speedy return of a child either wrongfully removed or wrongfully retained to its place of habitual residence.

The basic premise of the Hague Convention is that the Court is not determining a custody case but merely where the custody jurisdiction should be exercised. The Convention contains 45 articles which describe the objectives, define a wrongful removal or retention, determine to whom the Convention applies, how the application should be handled, what the Court must do and what defence can be raised to prevent an automatic return. It also provides a means of assisting parents fighting access rights abroad. The main distinction between the two conventions is that the Hague Convention seeks to protect rights of custody whereas the European Convention seeks to facilitate the recognition and enforcement of decisions relating to custody.

To initiate a case under the Hague Convention (and under the European Convention for re-enforcement or registration) a formal request must be made using the Central Authority of the country from which the abduction occurred to transmit to the Central Authority of the country where the child is located. The innocent parent will contact a lawyer in the country where the abduction occurred who will then make contact with the local Central Authority.

	<i>Page</i>
<i>Foreword</i>	v
INTRODUCTION	ix
CHAPTER 1	
INITIAL PROCEDURE	1
Introduction	1
Steps to be Taken by the Plaintiff	1
Injunctions	4
Port Alerts	5
Originating Summons	7
Steps to be Taken by the Defendant	10
CHAPTER 2	
WRONGFUL REMOVAL/WRONGFUL RETENTION	11
Introduction	11
CHAPTER 3	
HABITUAL RESIDENCE	14
Introduction	14
CHAPTER 4	
RIGHTS OF CUSTODY AND RIGHTS OF ACCESS	17
Rights of Custody	17
Rights of Access	19
CHAPTER 5	
DEFENCES	22
Introduction	22
CHAPTER 6	
RECOVERY OF A CHILD FROM A NON- CONVENTION COUNTRY	28
Introduction	28
Application for Custody and Return in the Foreign Jurisdiction	28
Contempt Proceedings	31
Extradition	32
Sequestration	32
Attitude of United Kingdom Courts to Non- Convention Cases	33
CHAPTER 7	
THE EUROPEAN CONVENTION	34
Introduction	34
Definitions	34
Procedure	35
Recognition and Enforcement	36
Access or Contact	39
CHAPTER 8	
THE CHILDREN ACT 1989	40
General	40
Has The Children Act Limited the Effect of the Hague Convention?	41
LIST OF CASE DIGEST	43
LIST OF APPENDICES	93
Index	169

Chapter 1

INITIAL PROCEDURE

Introduction

In cases under the Child Abduction and Custody Act 1985, a solicitor will either initially obtain instructions from the Lord Chancellor's Department on behalf of the parent whose child has been abducted (the Plaintiff in subsequent proceedings) or directly from the abducting parent (the Defendant) who has been served with court papers and needs advice as to what step to take next. This may include advice on making the child a ward of court as well as advice on how, if at all he or she can successfully defend proceedings under the Child Abduction and Custody Act 1985.

A solicitor may receive instructions to act for the proposed Plaintiff in circumstances other than through the Lord Chancellor's Department, *i.e.* by being contacted directly. In those circumstances the solicitor must refer the matter to the Lord Chancellor's Department for further consideration. The case will usually be passed on to one of the firms on the Child Abduction Panel. This consists of approximately 14 firms in Central London and the suburbs who have a proven track record of competence in the field of abduction or who have previously been recommended to the Lord Chancellor's Department. The Department may, infrequently give a non-Panel member permission to proceed with the case.

Steps to be Taken by the Plaintiff

1. Receiving Instructions from the Lord Chancellor's Department

- (i) The Lord Chancellor's Department receives instructions from the Central Authority of the State from which the child was abducted. Contact is made with a panel solicitor, and details of the case given over the telephone. Documentation is faxed across so that the solicitor can proceed as a matter of urgency. The documentation consists of the following:-
 - (a) A formal letter of instruction requesting the solicitor to act for the "innocent" parent (the parent from whom the child has either been wrongfully removed or retained) under the Hague Convention on International Child Abduction. (See Appendix 1(a), page 95. If the application could be dealt with under the Hague or European Conventions, see Appendix 1(d), page 100, for letter of instruction.)
 - (b) An application form completed by the innocent parent providing details of the following:-

Identity of child and parents

- (1) The minor's full name, address before removal, height, weight, colour of hair, colour of eyes, nationality, date of birth, place of birth, national insurance number and passport details.
- (2) The father's full name, date of birth, place of birth, nationality, occupation, passport/identity card, current address and telephone number, national insurance number, and country of habitual residence.
- (3) The mother's full name, nationality, date of birth, place of birth, occupation, passport details, current address and telephone number, national insurance number and country of habitual residence.
- (4) Date and place of marriage and divorce, if applicable.

Requesting individual or institution

Full name of innocent parent, nationality, occupation, current address and telephone number, passport details, country of habitual residence, relationship to child and name, address and telephone number of legal adviser, if any.

Information concerning the person alleged to have wrongfully removed or retained child (i.e. the abducting parent)

- (1) Full name, known aliases, date of birth, place of birth, nationality, occupation and name and address of employer, passport details, social security number, current location or last known address (in the country from which the abduction took place), height, weight, colour of hair and colour of eyes.
- (2) Other persons with possible additional information relating to the whereabouts of the child.

Time, date, place and circumstances of the wrongful removal or retention

Details of circumstances surrounding the removal or retention, *i.e.* how was the child abducted or retained? Was the child abducted during an access visit in circumstances where the abducting parent did not return the child at the end of the visit? Was the child abducted by the parent with whom he or she lives so that the innocent parent was alerted either by the failure of the child to appear for an access visit or by the lack of response when telephoning or attending the property? Often the abducting parent will make contact on reaching England or even from the airport and commonly knows friends or family in England and Wales with whom it is clear they will be staying.

Factual or legal grounds justifying the request, (i.e. custody or access rights)

Any details to show that the innocent parent has a justifiable claim under the CACA Act; in other words that rights of custody have been breached or access rights need securing by the Court. If the parties have been divorced, details of the relevant court order are necessary to show the arrangements made regarding the child's custody and access. If the parties are separated or have never been married relevant details of the legislation setting out the parties' rights of custody and access in connection with the child are necessary.

Civil proceedings in progress

There may well be other proceedings in progress in the country from which the child has been abducted i.e. divorce proceedings may be under way.

Person to whom child is to be returned

Full name, date of birth, place of birth, address, telephone number, proposed arrangements for return travel of the child.

Other remarks

Any other relevant considerations.

Documents attached

e.g. photographs, copies of passports, evidence of whereabouts of abducting parent (letters, etc).

- (c) Other relevant papers such as the relevant section of the domestic law defining rights of custody or a copy of the divorce judgment setting out the rights awarded to the parents of the minor.
- (d) Letters requesting compliance with the Court order, if applicable.
- (ii) The solicitor instructed must then immediately obtain Legal Aid. This can be obtained over the telephone. The solicitor should ask to be put through to the section of the Legal Aid Board local to them dealing with child abduction cases explaining who they are and that they have been instructed by the Lord Chancellor's Department to act for the proposed Plaintiff (giving name) under the Hague or European Convention. The Legal Aid Board require the innocent parent's full address, confirmation that the solicitor has obtained a formal letter of instruction from the Lord Chancellor's Department and a short summary of the case. Legal aid is granted as of that day, regardless of means (save for an application under Article 21 for contract). The solicitor must then forward a confirmatory letter of the conversation and a copy of the Lord Chancellor's Department's letter of instruction. A Legal Aid Certificate is received in due course.

- (iii) The solicitor, having now received formal approval from the Legal Aid Board to act is able to contact the client to obtain further instructions and also, where applicable, contact the domestic lawyer requesting relevant documentation not included in the application submitted to the Central Authority such as copies of relevant domestic legislation. The U.S.A. have set up District Attorneys' child abduction units in some States. These units are most helpful in providing background detail to the case, taking instructions from the client, providing any copy documentation required such as copy sections from relevant statutes concerning the parties custody and access rights to the child and also interpretation of such statutes and court orders for the purpose of ascertaining whether there has been a breach of custody rights (these can then be used in either the Originating Summons or the Affidavit). They, together with, or independently from, the parent's lawyer are also able to obtain information as to the social background of the child (Article 13) and frequently also an order under Article 15. These two Articles are dealt with in further detail in Chapters 2 and 5.

The panel solicitor will then obtain an Injunction, organise a Port Alert and issue an Originating Summons.

Injunctions

An Injunction should be obtained prior to service of the Originating Summons if the Plaintiff believes the Defendant is likely to flee with the child when served with the Originating Summons. (In practice this should be done in all cases under Article 3.)

1. Procedure

An Injunction is obtained *ex parte* before the Judge of the day (see Appendix 2, page 102.), who should be provided with a copy of the Originating Summons for his reference, and a request should be made for an order in the following terms:-

- (i) That the Defendant be restrained from removing the minor from the jurisdiction of England and Wales.
- (ii) That the Defendant be restrained from removing the minor from (*current address*) or its current place of residence.
- (iii) That the Defendant do surrender his passport and that of the minor, to the process servers.
- (iv) That the Defendant do confirm the minor's whereabouts to the process servers (if not at the above address).
- (v) That the Defendant do appear at the return date as stated in the Originating Summons.

The word "minor" has been used here and elsewhere in the text as this is the term used in the Convention. Otherwise the word "child" is used as this reflects current practice.

The order should be served on the Defendant together with the Originating Summons once the Injunction has been obtained and the Port Alert has been activated (see page 111).

A penal notice is endorsed on this order so that if the Defendant fails to comply with the terms of the order, he will be in contempt of Court.

The process servers must be instructed to attend at the address, serve the documents (see letter of service at Appendix 3, page 104), collect the passports and if possible, check the child is actually there and if not, obtain details of his/her whereabouts. (See Letter of instruction at Appendix 4, page 106.)

The process servers must produce Affidavits of Service prior to the hearing. (See Appendix 5, page 107.)

The process servers should give the passports to the Plaintiff's solicitors who hold them to the order of the Court. If an order is made for the children's return the Court will make directions for the passports to be handed back. Care should be taken to ensure they are handed over to the Plaintiff if he/she returns with the Defendant and child/ren or if not accompanying the Defendant they are only released at the airport to avoid the Defendant fleeing elsewhere.

If the child's whereabouts in England are unknown, an *ex parte* application can be made for a seek and find order. This is addressed to the Tipstaff and should be done as soon as possible to ensure that the story is still fresh and it gets maximum coverage. The Court may assist by making an order for press publicity (see Appendix 6, page 109) and informing the national and local newspapers through their publicity office. The Plaintiff's solicitors can approach local papers direct as well.

Individual orders can be obtained *ex parte* to enlist the assistance of the D.S.S., banks and credit card companies in locating the child.

If the whereabouts of a relative or friend with information concerning the child is known, an *ex parte* application can be made and a return date obtained. If this person is successfully served, he will be obliged to appear before the Court and can be cross-examined. (See Appendix 7, page 110.)

There is no power to seek further information as to the previous whereabouts of the child, if, by the time of the court hearing, the court knows the whereabouts of the child (*Re D (A Minor) (Child Abduction)* [1989] 1 F.L.R. 97 (see page 56)).

Port Alerts

If an Injunction is obtained, then, following on from this, a Port Alert should be activated for the same reasons, namely a danger that the Defendant will flee the country with the child. The Port Alert system operates 24 hours a day using the police national computer. The child's details are placed on the computer so that any attempt to leave the jurisdiction can be prevented.

- (i) A Port Alert should ordinarily be organised through the solicitor's local police station. The solicitor should ask to be put through to the CID Section explaining that they require a Port Alert to be activated. The Detective Inspector on duty deals with this.

An Injunction is certainly not essential to obtain a Port Alert, but the police generally ask to see one so that if the child is stopped at a later stage, they can refer to an order.

- (ii) The information required to activate the Port Alert is contained in the *Practice Direction - Children: Removal from Jurisdiction* [1986] 1 W.L.R. 475. As much as possible of the following information must be provided:-
 - (a) Regarding the child: names, sex, date of birth, description, nationality, passport number (if known).
 - (b) The person likely to remove: names, age, description, nationality, passport number (if known), relationship to the child and whether the child is likely to assist him or her.
 - (c) Person applying for a Port Alert: names, relationship to child, nationality, telephone number (and solicitor's name and telephone number if appropriate).
 - (d) Likely destination.
 - (e) Likely time of travel, port of embarkation and port of arrival.
 - (f) Grounds for Port Alert (as appropriate):-
 - (1) a suspected offence under Child Abduction Act 1984, s.1.
 - (2) the child is subject to a court order.
 - (g) Details of the person to whom the child should be returned if intercepted.
- (iii) The Port Alert is valid for four weeks. This is generally sufficient time since the hearing date on the Originating Summons must be within three weeks. If the proceedings are adjourned for any reason, the Port Alert can be renewed.
- (iv) Once the police have all the information and a copy of the Injunction (if appropriate) they should confirm the Port Alert is in force immediately. It will then be appropriate to serve the documents on the Defendant. The police may ask for a contact number in the event that the child is intercepted. If this happens, a request should be made that the child and the Defendant remain in police custody overnight.

Note

To activate a Port Alert, the police must be convinced that the danger of removal is both "real and imminent", *i.e.* that there are grounds for believing the child may be removed and this removal is likely to occur in the next 24 to 48 hours. In practice, if the letter to the police setting out full details required by the practice direction states that the removal is both "real and imminent", this will suffice (see Appendix 8, page 111). The police do not generally enquire further.

The abducting parent upon being served with the papers may as a safeguard decide to apply for the child to be made a ward of court, giving them temporary care and control of that child pending a return date. This however does not stop the court in the Hague Convention proceedings from ordering the return of the child if appropriate.

It may be possible, in cases where an application is unsuccessful under the Hague Convention, for the matter of access to be dealt with under proceedings in wardship at the time. It is worth attempting to get the wardship proceedings transferred from the District Registry in which they were issued to be dealt with at the same time as the Hague Convention proceedings in the event that the latter are dismissed. It is essential to remember however that the innocent parent is not entitled to legal aid as of right in wardship proceedings, but only subject to a means and merit test.

The port alert system does not apply to the removal of a child to the Isle of Man, Channel Isles or Eire. There is thus a risk that children will be removed through these islands thereby avoiding the stop notice system.

Originating Summons

1. Procedure

Proceedings are commenced by way of Originating Summons (RSC, Ord. 90, r. 33(2)) in the High Court under the Child Abduction and Custody Act 1985. The Defendants should include the abducting parent and any other persons involved, e.g. members of the family who assisted in or have knowledge of the abduction or whereabouts of the child.

The Originating Summons should contain the following:-

- (i) Request for an order that the Defendant disclose the whereabouts of the minor to the plaintiff and the Court.
- (ii) Request for an order that the Defendant return the minor to the custody of the plaintiff and/or Tipstaff or other person designated by the plaintiff.
- (iii) Request for an order that the Defendant do return the minor forthwith to the jurisdiction of the child's habitual residence pursuant to Article 3. (See Appendix 9(a), page 113.)
- (iv) Request for an order that costs be provided for.

The Court will also require the following information:-

- (i) The full name of the minor, date of birth and habitual residence.
- (ii) The relationship of the Plaintiff and the Defendant to the minor.
- (iii) The place at which the minor is thought to be residing in England.
- (iv) A statement that the parties are the minor's custodians. (See Appendix 9(a), page 113.)

In practice, if it is impracticable for the Plaintiff to swear an Affidavit prior to the hearing, the Originating Summons could include a more detailed summary of the facts of the case and relevant enclosures such as:-

- (i) A copy of the relevant section in the domestic statute interpreting the legal rights of parents and the terminology used in orders in that country. (See Appendix 10, page 117.)
- (ii) A copy of the divorce judgment if applicable. (See Appendix 11, page 119.)
- (iii) Copy letters from lawyers or District Attorneys interpreting terminology. (See Appendix 12, page 120.)

If possible, and in preference, the Plaintiff should provide a detailed Affidavit (see Appendix 13, page 122) dealing with the following:-

- (i) Background of the case, to include a summarised history of the parties' relationship, bringing the court to the up-to-date position.
- (ii) Events leading up to the wrongful removal or retention. If known, why the child was abducted *i.e.* was it after a particular event or argument? Was the relationship over? Did one party wish to return to England as a result due to proximity of friends, family or a new partner?
- (iii) Relationship with the child and/or time spent looking after the child. Full details of the parent/child relationship. *i.e.* if not living with the child when they saw the child, where they went together; what they did; input to the child's upbringing, physical and emotional caring for the child, and time spent with the extended family.
- (iv) Details of legal rights pursuant to domestic statute or details of the divorce judgment. (See examples in Appendix 14(a) and 14(b), pages 124 and 125.)

The Court has the discretion to admit oral evidence but the parties have no automatic right to give evidence, other than by way of Affidavit (*Re E (A Minor) (Abduction)* [1989] 1 F.L.R. 135).

In *Re A (A Minor) (Abduction)* [1988] 1 F.L.R. 365 (see page 45) oral evidence had been given but all the parties concerned had been present, distinguishing it from the situation in *Re E* where the mother was in Australia and there was no suggestion it would have been possible for her to attend Court. *Re E* indicates the attitude of the Court towards the exercise of its discretion in deciding whether to admit oral evidence, in that the Court must always be mindful of the need to act expeditiously when dealing with a breach of the Convention and should not admit such evidence if to do so would cause significant delay.

This Affidavit can be filed at the same time or after the Originating Summons.

Re F (A Minor) (Child Abduction) [1992] 1 F.L.R. 548, C.A. was a case on the procedural aspects of cases under the Hague Convention and the 1985 Act. One of the issues considered, was whether the Judge should have heard oral evidence to resolve a conflict that appeared in the Affidavit evidence. The Court of Appeal held that admission of oral evidence should be used sparingly. A Judge should see whether there was any independent evidence to resolve the conflict of evidence between the parties, with the caveat that the evidence had to be compelling to justify the

rejection of the sworn evidence of a deponent. If there was no such means for deciding between the written evidence of the parties, the result would be that the applicant, who bore the burden of proof, would not succeed. Alternatively, inherently improbable evidence could be rejected without oral evidence.

There is no fee payable on lodging the Originating Summons.

The Originating Summons is filed at the wardship section in the High Court.

An accompanying form must be completed to give details of any other current proceedings involving the child, e.g. wardship. This is provided by the Court. (See Appendix 15, page 128.)

A copy of the Originating Summons is issued for each Defendant with an accompanying Acknowledgment of Service form. (See Appendix 16, page 130.)

These are served on the Defendants after an Injunction has been obtained, and a Port Alert activated, by the process servers.

The Court may ask for an Affidavit in support, either from the Plaintiff or the solicitor appearing on his behalf, to explain why the Injunction is necessary.

The Judge may request the solicitor to draft the general terms of the order for the court clerk or associate. A request should be made for the order to be drawn up that day.

If the Defendant has instituted any proceedings under the Children Act 1989 either for a Residence or Prohibited Steps Order with a return date prior to the return date of the Originating Summons this should be mentioned with any interim orders made in relation thereto.

2. Who is The Defendant

The Plaintiff issues the Originating Summons. The following persons should be named as Defendants (Family Proceedings Rules 1991, r.6.5)

- (i) the person alleged to have brought the child (in respect of whom an application is made under the Hague Convention) into the United Kingdom;
- (ii) the person with whom the child is alleged to be;
- (iii) any parent or guardian who is within the United Kingdom, if not otherwise a party;
- (iv) the person in whose favour a decision relating to custody has been made, if not otherwise a party;
- (v) any other person who appears to the Court to have sufficient interest in the welfare of the child.