

2021

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Recommended Citation

Morgan Handwerker, *Jamaica Joins the Hague Child Abduction Treaty*, 41 CHILD. LEGAL RTS. J. 58 (2021).

Available at: <https://lawcommons.luc.edu/clrj/vol41/iss1/6>

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Around the World:
Jamaica Joins the Hague Child Abduction Treaty

*Morgan Handwerker**

I. INTRODUCTION

As COVID-19 rages across the world and people are forced to quarantine with family members, many relationships between parents have soured, which can lead to conflicts such as domestic violence, divorce, and potentially a parent taking the children and leaving the country. Quarantining has been especially complicated for separated and divorced parents who live across borders. As such, there is a distinct possibility that international custodial abductions will increase. If a parent were to commit custodial abduction, they would likely pick a country without a legal remedy that provides for the child's return. Given Jamaica's recent ratification of the Hague Child Abduction Treaty, Jamaica is less likely to become a mecca for North American parents seeking to commit international custodial abduction.

This article will summarize the Hague Child Abduction Treaty. Next, the article will explain why a parent may commit a custodial abduction. The article will then discuss Jamaica's ratification of the Hague Child Abduction Treaty. Finally, the article will acknowledge potential implications of Jamaica's formal adoption of the treaty.

II. WHAT IS THE HAGUE CHILD ABDUCTION TREATY?

The Civil Aspects of International Child Abduction, more commonly known as the "Hague Child Abduction Treaty," was conceived at the Hague Convention of October 25, 1980. The civil multilateral treaty was created to shield children from unlawful removal across international boundaries by providing a legal procedure to bring about their swift return and to protect the parents' rights of access to their custodially abducted child. One hallmark feature of the Hague Child Abduction Treaty is that it focuses on the rights of children, rather than the rights of parents.

Nations who have adopted the Treaty have agreed that parents shall not be allowed to forum shop across countries when it comes to custody of their children. Furthermore, the Treaty requires the rapid repatriation of children under age sixteen who were illegally removed by a parent from the country in which they resided.

A remedy is available under the Treaty when: (1) the child in question is under the age of sixteen; (2) the Treaty is in effect between both the country where the child was residing at the time of the wrongful removal and the one to which the child was taken; (3) the child was wrongfully removed or retained away from their habitual residence; (4) the non-removing parent had custody rights; and (5) at the time of the removal, the custody rights were exercised, or would have been, if not for the removal of the child. The Treaty

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also assists applicant parents in securing the actual exercise of their rights of access to a child when those access rights have been violated.

A wrongful removal is defined “as one which is in breach of custody rights attributed to a person, institution, or other body, under the law of the state in which the child was habitually resident immediately before the removal or retention.” The burden of proof rests on the applicant to establish by preponderance of the evidence that the child in question has been unlawfully removed. If all abovementioned elements are met and less than one year has passed between the wrongful removal or retention and the time a Hague proceeding has been filed in court, then the child must be returned to the child’s home country immediately.

However, there is no treaty obligation to return a child if the proceedings to return the child are initiated by filing a Hague action in court one year or more after the alleged retention or removal, and it is established by a preponderance of the evidence that the child is settled in their new environment. The party opposing the return of the child must demonstrate, by a preponderance of the evidence, that the party seeking the child’s return was not truly exercising their custodial rights at the time of the removal or retention or had agreed to the removal or retention.

There are four possible defenses which can be invoked by the parent who removed the child from its home country. First, the child who objects to repatriation “has an age and degree of maturity at which it is appropriate to take account of its views.” Second, over one year has elapsed from the date of wrongful removal or retention and the child has settled into their routine (the “one year plus now settled” provision). Third, the child’s return would not be permitted under the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms. Last, there is a “grave risk that the child’s return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” Courts in the United States have reasoned that serious physical abuse, sexual abuse, and extensive or serious domestic violence create “a grave risk,” but poverty, neglect, and substandard parenting do not.

III. WHY MIGHT A PARENT ABDUCT THEIR CHILD?

While some parents abduct their children with malicious intent, others do so in an attempt to seek a safe haven away from domestic violence. Therefore, it comes as no revelation that in the search for safety, abused parents often seek refuge across national borders. Four different studies conducted by psychologists and social workers have shown that “almost half of the families in which adult domestic violence occurs also show evidence of child maltreatment.” Consequently, out of concern for both the parent and child’s safety, an abused parent may flee with its child. However, children may also be abducted by the abusive parent as another way to hurt and control their partner.

Reports reveal that roughly one-third of both published and unpublished Hague Convention cases involve some type of family violence. Additionally, about 70% of these cases include details of adult domestic violence. Reports have also shown that “seven out of nine Hague Convention cases that reached an appeals court in the last half of 2000 involved an abducting mother who claimed she was a victim of domestic violence.” When

the third meeting of the Special Commission to discuss the operation of the Treaty was concluding, “the participants recognized ‘the majority of children . . . were taken away from their country of habitual residence by their mothers, who not infrequently alleged that they or the children had suffered hardship and domestic violence at the hands of the father.’”

IV. JAMAICA BECOMES A SIGNATORY TO THE TREATY

On April 1, 2019, Jamaica became the seventy-ninth signatory to the Hague Child Abduction Treaty. Jamaica is an island nation located approximately 715 miles south of the United States and slightly smaller in size than the state of Connecticut. It is home to 2,808,570 people, and tourism accounts for 20% of Jamaica’s Gross Domestic Product. Many of Jamaica’s tourists come from the United States—approximately 1.838 million tourists visited Jamaica in 2019.

Jamaica’s judicial system, like that of the United States, is based on the English common law. The highest courts are the Courts of Appeals, which consist of a president and a minimum of four judges, and the Supreme Court, which has forty judges who are organized in special divisions. Jamaica’s subsidiary courts include resident magistrate courts, district courts, and petty sessions courts. Any appeals that go beyond Jamaica’s highest courts are referred to the Judicial Committee of the Privy Council, which is based in London, rather than the Caribbean Court of Justice, which is the appellate court for Caribbean member states.

V. POTENTIAL IMPLICATIONS OF JAMAICA’S FORMAL ADOPTION OF THE TREATY

The implication of becoming a signatory to the Treaty is significant. Each country has its own sovereign laws and thus, cannot interfere in another country’s legal system. Consequently, for nations who have not formally adopted the Treaty, if a child is unlawfully removed from one country and taken to another, it is incredibly difficult to litigate the issue and return the child to its lawful homeland. With each signatory, the Treaty becomes stronger and builds a greater deterrence for international custodial abductions.

Additionally, there has been increasing globalization of businesses and education since the Hague Convention was drafted and first ratified in 1980. The globalization is in part due to the technological advances which have also made international travel significantly more affordable. One of the most notable technological advances is the internet, which has connected businesses and individuals across borders since its creation in 1990, ten years after the ratification of the Treaty. Therefore, the need for the Treaty is even greater now than when it first went into effect.

However, 2020 has brought a new sense of importance for member states of the Treaty. As COVID-19 rears its ugly head across the world, lives are being disrupted in drastic, unparalleled ways. International travel has all but come to a halt as countries try to contain the spread of the disease. Many adults and children are being forced to quarantine like never before.

For parents who live across borders, quarantining has been particularly challenging. Logistically, international travel has been subject to numerous restrictions, but people are still able to travel internationally. Thus, it is not implausible that there could be a rise in international custodial abductions. Additionally, removing or retaining a child would give the physically present parent sole power to make medical decisions on behalf of the child. This could be particularly consequential if parents disagree over whether a child should receive a vaccine for COVID-19 when it becomes available.

Jamaica's recent adoption of the Treaty also has significant implications for North American countries, like the United States, given its close proximity. While a fourteen-day quarantine and a negative polymerase chain reaction COVID-19 test are required for everyone coming to the island, Jamaica is one of few countries currently welcoming American citizens. As such, a parent from the United States who wants to commit a custodial abduction may initially find Jamaica to be an appealing destination. However, since Jamaica is now a signatory to the Treaty, which would likely require immediate return of the child, parents should be deterred from bringing their child to Jamaica with the intent to abduct the child.

VI. CONCLUSION

Jamaica is an attractive place for parents looking to repatriate with their children given its tropical climate, close proximity to North America, and permitted entry of American nationals under current COVID-19 protocols. However, given Jamaica's recent formal adoption of the Hague Child Abduction Treaty, Jamaica is less likely to become a mecca for North American parents seeking to commit international custodial abduction.

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