# The 1980 Hague Convention on the Civil Aspects of International Child Abduction

# PREPARING RETURN APPLICATIONS

#### **CHECKLIST**

(Please click on underlined items to be linked to an explanatory note.)

# Immediately review incoming cases and consider the following:

1.	Applicability of Hague Convention			
	a. Contracting state	Yes	No	
	b. Age of the child under 16	Yes	No	
2.	Most expeditious proceedings (under 6 weeks)	Yes	No	
3.	Related cases?	Yes	No	
4.	Preventative Measures			
	a. High risk	Yes	No	
	<ul> <li>Risk of parent absconding with child</li> </ul>	Yes	No	
	c. Non-removal orders	Yes	No	
	d. Supervised visitation	Yes	No	
	e. Secure passport	Yes	No	
	f. Bond or cash in lieu	Yes	No	
	g. Placement of child in foster care	Yes	No	
5.	Scheduling	Yes	No	
6.	Representation by counsel	Yes	No	
7.	Case management	Yes	No	
8.	Court-to-court judicial communications	Yes	No	
9.	Evidence			
0.	a. Speedy?	Yes	No	
	b. Need for evidence of foreign law?	Yes	No	
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10.	Preparing the order	Yes	No	

#### **QUESTIONS TO CONSIDER**

When a return application under the Hague Convention is brought before the Court of Queen's Bench, the following procedures should be followed by the parties to ensure the expeditious determination of the application:

- A. Assessing your case:
  - (i) Ascertain applicability of the Hague Convention.
  - (ii) Identify related cases (i.e. custody, access)<sup>1</sup>.
  - (iii) Is there a need for any immediate preventative measures?
    - Is the child in any danger or is the abducting parent a flight risk?
       Are any additional steps required in order to protect the child or to keep it in the jurisdiction until the application is heard?
  - (iv) Due process: ensure that notice is given to respondent.
    - However, may proceed ex parte where abducting parent is likely to abscond with child - but caution should be exercised in determining whether circumstances are appropriate to proceed on an ex parte basis: see Alexander v. Curry, 2007 ABCA 128.
  - (v) Contact the Alberta Central Authority prior to the hearing to advise that a return application is being brought before the court.<sup>2</sup>
    - The Central Authority can provide assistance in facilitating the return of the child e.g. dealing with immigration issues, criminal or child protection concerns, or issues such as whether the applicant can enter Canada to retrieve the child or whether the abducting parent can enter the contracting state to return with the child.
  - (vi) Schedule case management conference with the Court of Queen's Bench. To do this, apply to the Trial Coordinator in the relevant Judicial District to have a judge named to hear the application in the first instance.
  - (vii) Set date for hearing.

<sup>&</sup>lt;sup>1</sup>Request Clerk to check with both Court of Queen's Bench and Provincial Court for related cases.

<sup>&</sup>lt;sup>2</sup>The Family Law Branch of Alberta Justice fulfils the responsibilities of the Alberta Central Authority. Contact information for the Alberta Central Authority can be found in the online "User's Guide" or here.

## B. Applicability of Hague Convention

- (i) Contracting State: 81 nations have signed, ratified, or acceded to the Convention<sup>3</sup>.
- (ii) Age of the Child: must be under 16 years of age, i.e. 15 years or younger<sup>4</sup>.

# C. Most expeditious proceedings

- (i) Return applications to be given priority over other cases: see Alberta Procedural Protocol.
- (ii) Article 11: "The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children".
- (iii) Expeditious = 6 weeks.
- (iv) "If the judicial or administrative authority concerned has not reached a decision within 6 weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay.": Article 11.
- (v) Advise the Trial Coordinator that the application is a Hague application and that return applications are to be given priority on the setting of times.
- (vi) Request an Order to abridge time or to proceed on an urgent or without notice basis where the circumstances warrant.

#### D. Abate related cases

(i) If you are aware of other cases or applications concerning the children who are subject to a return application under the Hague Convention,

<sup>&</sup>lt;sup>3</sup>See online here.

<sup>&</sup>lt;sup>4</sup>Hague Convention, Article 4.

- those custody/visitation hearings regarding incoming cases (but not enforcement of outgoing cases) should be stayed.
- (ii) Proceed with disposition of other pending cases related to outgoing cases final order should include language to facilitate enforcement.

#### E. Preventative Measures

- (i) Identify the high risk cases (e.g wealthy parents, poor parents; transferable employment skills; perception of valueless parent; lack of financial ties to present jurisdiction; family, political, cultural, social ties and support system in foreign country; false but honest belief that child has been abused or neglected; previous abductions or threat of abduction).
- (ii) Is there a real risk of parent absconding with child?
- (ii) Non-removal orders.
- (iii) Supervised visitation.
- (iv) Secure passport: parent; child; notification of passport agency.
- (v) Bond or cash in lieu.
- (vi) Placement of child in foster care.

## F. Scheduling

- (i) Considerations in scheduling: usual procedures impractical; absent parent disadvantaged; what issues will be raised; whether experts should be appointed.
- (ii) Parties may appear by telephone or video conference where appropriate and where such facilities are available (consider whether a requirement for the applicant's personal appearance would cause undue delay in the consideration of the application no adverse inference should arise where the overseas applicant is unable to attend personally).

# G. Representation by counsel

- (i) Alberta is not bound to assume any costs for legal counsel or advisors or from court proceedings, unless the parties are eligible to receive legal aid.
- (ii) The Alberta Central Authority does not act for any party or otherwise actively participate in return applications brought before the court. However, the presence of the Central Authority may be requested to provide additional information to the court.
- (iii) Does the child require its own counsel?

## H. Case management

- (i) First hearing to deal with immediate issues: applicability of Convention; scheduling and timetables; need for counsel (for child, for party); security of the child.
- (ii) Is this an appropriate case for mediation?
- (iii) Are other provisional measures required before the application is heard?
   e.g. measures to prevent the removal of the child (where the abducting parent is a flight risk), placing the child in temporary protective custody.
- (iv) Confirm that Alberta Central Authority has been advised of the pending application. If appropriate, request that the Central Authority attend the application to provide information on facilitating the return of the child.<sup>5</sup>
- (v) If the return of the child is ordered, what travel or exchange arrangements should be made?

## H. Court-to-court judicial communications

- (i) Identify related case(s) in other jurisdiction.
- (ii) Is this an appropriate case for court-to-court judicial communications

<sup>&</sup>lt;sup>5</sup>As noted earlier, the Alberta Central Authority cannot appear before the court as a representative of either the applicant or the respondent. The Central Authority's presence during a return application is limited to acting as an information resource to the court and to the parties in general.

- between the Alberta court and the court in the other jurisdiction, e.g. a joint hearing (see *Hoole v. Hoole*, 2008 BCSC 1248)?
- (iii) Parties should be advised of any court-to-court judicial communications and should either be present when such communications take place or the court should provide the parties with a summary of the communications.
- (v) Consider undertakings in the other jurisdiction (particularly if the child's safety once returned to its habitual residence is at issue).
- (vi) Consider mirror orders.

#### I. Evidence

- (i) Rules and practices concerning the taking and admission of evidence, including the evidence of experts, should be applied in return proceedings with regard to the necessity for speed and the importance of limiting the enquiry to the matters in dispute which are directly relevant to the issue of return.
- (ii) Given the summary nature of the proceedings, the court ought to give a liberal interpretation to the documents and where appropriate, relax the rules of evidence; only in exceptional cases should there be oral evidence or even cross-examinations on affidavits.
- (iii) Evidence of foreign law: court may take judicial notice of foreign law and judicial or administrative decisions made in the State of habitual residence without recourse to specific procedures for proof of foreign law or formal recognition of foreign decisions (Article 14). The court may request that the applicant obtain a decision or determination from the State of habitual residence that the removal or retention of the child was wrongful (Article 15), however this is not necessary in order to determine a return application.
- (iv) Documentary evidence: greater reliance on documentary evidence and sworn statements and less reliance on oral evidence (unless exceptional circumstances). In cases where the issue demands oral evidence (e.g. conflicts in affidavits which go to a critical point), such evidence ought to

be limited and focused upon the issue.6

# K. Preparing the order

- (i) If child is returned: specify travel and exchange arrangements; conditions of return; enforcement by police authorities; report return of child to Central Authorities; report location of child upon return.
- (ii) Time considerations: the order should provide sufficient direction to the parties to effectuate the child's return within a certain period of time.
- (iii) Enforcement: include provisions to ensure that the order leads to the prompt and effective return of the child; consider enforcement mechanisms (e.g. provisions for contempt of court, fines or imprisonment); efforts should be made by the Central Authority, or by other competent authorities, to track the outcome of return orders and to determine in each case whether enforcement is delayed or not achieved.
- (iv) Conditions of return: cost of travel; post bond; provide specific travel information by certain date.
- (v) Is the child in need of protection upon return to its country of habitual residence?
- (vi) The court can impose undertakings on the parties to deal with a transition period between the time of a return order and the time at which the custody issue may be placed before the court in the county of the child's habitual residence<sup>7</sup>.
- (vii) Other undertakings; mirror orders; safe harbour orders (e.g. advance protective orders made in the state of habitual residence to which the child is to be returned).
- (viii) Costs: may hold the abducting parent responsible for the costs associated with finding the child as well as costs related to the proceedings<sup>8</sup>.

<sup>&</sup>lt;sup>6</sup>Note that the judiciaries of a number of countries (e.g. Australia, UK) have set precedents for limiting the presentation of oral evidence, in order to expedite the proceedings.

<sup>&</sup>lt;sup>7</sup>See *J.S.S. v. P.R.S.*, 2001 SKQB 283, at para. 60.

<sup>&</sup>lt;sup>8</sup>See Article 29.

(ix)	If the order is not signed when the court determines the Return Application, an appointment should be made to meet with the same judge to have the order signed within 24 hours of the decision being rendered. Any request for a stay of the order could be considered at that time.		