

This is my first Hague Convention case. What do I do?

1. What amounts to a *prima facie* case for return?

The 1980 Hague Convention provides that the court shall order a child's physical return to his or her habitual residence where a child

- is under age of sixteen and
- has been wrongfully removed
- from his or her habitual residence
- in violation of the custody rights of the left-behind parent.

The burden of proof for the *prima facie* case is a preponderance of the evidence.

2. What are the defenses to the request for return of the child?

- Delay –
 - a petitioner has not filed the petition for return within one year of the time that the child was wrongfully removed or retained, *and*
 - the child has become settled in the new environment
- Custody Rights – the Petitioner is not actually exercising custody rights to the child
- Grave Risk – return would subject the child to a grave risk of physical or psychological harm or put the child in an intolerable situation
- Human Rights – return would be contrary to U.S. concepts of human rights or fundamental freedoms
- Objection by Child – a court has discretion not to order the return of a child of sufficient age and maturity who objects to return to the habitual residence

All defenses are subject to narrow interpretation, and the “grave risk” and “human rights” defenses must be proved by clear and convincing evidence. All other defenses are provable by a preponderance of the evidence.

3. Time considerations. Be aware of the very short time frame for the resolution of Hague Convention cases.

Six-week standard. There is an expectation built into the Convention that cases should be resolved within six weeks from the time of filing until the court makes a decision. Article 11 provides

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six 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.

In addition, Article 2 provides that

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Because of the requirement for expedited hearings, courts are given substantial discretion in managing Hague cases. This includes the authority to limit or eliminate discovery or allow discovery on an expedited basis, to employ summary proceedings to determine the adequacy of the *prima facie* case or the existence of a defense, and to decide whether the case requires a plenary evidentiary hearing or may be tried on the documents and affidavits submitted by the parties.

4. Remedy – the physical return of the child to his or her habitual residence.

One of the unique facets of the Hague Convention is that it empowers a court to order the physical return of a child back to his or her “habitual residence.” Where return is ordered, the court should fashion an order that clearly mandates the child’s return and authorizes state and federal law enforcement officials to assist, when necessary, the implementation of the order.

5. Does the Convention apply to this case?

There are a few threshold issues:

a. Is the Convention in Force? Is the Convention in force between the United States and the country that the child was abducted from? You can check if the treaty was in force between the U.S. and the other country at the following websites:

U.S. State Department Website:

<http://www.travel.state.gov/content/childabduction/english/country/hague-party-countries.html>

Hague Permanent Bureau Website:

http://www.hcch.net/index_en.php?act=conventions.status&cid=24

b. Age. Is the child under the age of sixteen years? This is jurisdictional. If the child is sixteen or older, the court cannot order a return. Sometimes more than one child is abducted. Only those siblings that are under sixteen are subject to return under the Convention.

c. Concurrent Jurisdiction. Congress conferred original jurisdiction on both state and federal courts to hear Hague Convention cases. Issues relating to removal or abstention may arise, depending on the facts of the case.

6. What is the law that applies to the case? Where do I find it?

a. The 1980 Hague Convention – A copy is available on this website. You may also find a copy at http://www.hcch.net/index_en.php?act=conventions.text&cid=24

b. ICARA – International Child Abduction Remedies Act – is found at 22 U.S.C. §§ 9001 et. seq. This legislation was passed by Congress in 1988 and implemented the Convention in the United States. ICARA sets forth:

- the burdens of proof applicable to the various issues
- relaxed rules for the admissibility of documents
- guidelines for the award of fees and costs

c. Aids to interpretation:

Peréz-Vera Report – The commentary of the official reporter of the sessions that led to the approval of the Convention by the Hague Conference. This report has been routinely cited by courts as an aid to interpreting the terms of the Convention. A copy is available on this website.

U.S. State Department Text & Legal Analysis – This document was drafted for consideration by the Senate during the process of ratification. It is given interpretative weight by courts. The Text & Legal Analysis can be found at 51 Fed. Reg. 10,494 et. seq. (March 26, 1986) and is also available on this website

There is a substantial body of U.S. state and federal case law dealing with the Convention.

Foreign decisions can also form the basis for interpretative analysis. Major foreign decisions can be found in a searchable database maintained by the Hague Permanent Bureau at INCADAT.com

7. Consider holding an early case management conference - Rule 16

The benefits of holding an early conference:

- Counsel are made aware of time constraints
- The court may want to require counsel to submit statements detailing
 - the proof underlying a prima facie case for return
 - the proof underlying any defenses
 - the affidavits and other documents supporting the parties' respective claims
 - the expected range of the evidence
 - whether there are actual, material, and relevant factual disputes
 - whether an evidentiary hearing will be necessary
- Parties can discuss the time necessary to conduct the trial and set a trial date
- The court may take measures to reduce the chance that the child will be re-abducted pending further proceedings
- If appropriate, the court may
 - make orders for visits with the left-behind parent

- refer the parties to mediation to attempt a voluntary resolution (without extending the time for trial)
- consider appointment of counsel or guardian ad litem for child
- Determine whether interpreters are necessary
- Consider, *sua sponte*, setting a hearing date for a motion for summary judgment