MEDIATION INTERNATIONAL

IN CHILD ABDUCTION CASES

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International parental child abduction is a prevalent phenomenon that has aroused the anxious interest of most national governments. It usually arises out of a complex and extreme breakdown in the relationship between parents. It frequently causes acute emotional distress to both parents involved, and most importantly, to the abducted children.

Governments from many nations have been cooperating to seek a consistent approach, to discourage, and as far as possible, undo the effect of, international parental abductions. Most such abduction cases coming to our courts are considered under the provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention). The basic premise is humanitarian - that it is normally in the best interest of an internationally abducted child to be returned as quickly as possible to the country from which he or she has been taken.

In England cases are tried by High Court Family Division judges and are heard in London. Applicant parents are entitled to mandatory legal aid to pursue the application for the return of the child, (irrespective of their means). Cases are normally resolved

within six to eight weeks, and, unless the abducting parent can show a technical failure to meet the Hague Convention criteria or unless the case comes within one of the strict defences, the application will result in an immediate return of the abducted child.

There are now 63 member states to the Hague Convention.

When the Hague Convention came into law, it was expected that the majority of cases would be those in which parents have separated, and the parent with whom the children are not living snatches them and hides them, or refuses to send them back following an access visit. For such cases, the Hague Convention works well, and although mediation might allow scope for a voluntary arrangement, a speedy return is usually the inevitable and right answer.

However, 70% of Hague Convention applications involve children removed, or retained by their **primary** carers, usually their mothers, but without the permission of, and in breach of the legal rights of, the other parent. As the Hague Convention does not distinguish between parents who are primary carers and those who are not, whatever the outcome of the application there will be a further hearing on the merits of the case. The process causes emotional strain and disruption to the children and their parents, and falsely raises the hopes of the 'left behind' parent. The frequent result, following further dislocation, expense, heartache, and litigation, is that the children and the primary carer, who originally abducted, return, legally to the country. However the very process of highly charged litigation and a physical return will often put paid to any prospect of an amicable resolution of the issues. At the same time the children concerned suffer the trauma of at least three relocations in a short time. This

unanticipated outcome of the Hague Convention has concerned judges, politicians, lawyers and non-government organisations.

In many of these cases, the central issue for the left behind parent is in fact contact or visitation and not the wish for a permanent return.

The left behind parent, justifiably sees the removal or retention of the children as an attempt to "cut them out" of the children's lives. An application under the Hague for the pre-emptory return of the child appears to be the only option open to them and the only way to secure adequate contact rights. Both parents are often frightened to even commence negotiations, for fear of being seen as abandoning their respective positions.

If, before the court hears a Hague Convention application, the parties had the opportunity to consider all their options, with the assistance of mediators familiar with international children's cases, it is possible that a realistic practical solution could be achieved which would obviate the need for repeated moves and litigation.

An agreement between parents arrived at through mediation could:

(1) avoid the cost to public funds of the Hague Convention proceedings, and the costs of proceedings in the other country - although a consent order would still be required;

(2) avoid the stress of contentious litigation in two countries;

(3) avoid the uplifting of the children from the requesting state to the home state, only for there to be a return later following disputed custody proceedings with all the attendant stress and further damage to the relationship between the parties;

(4) avoid a substantial delay in resolving the future of the family in its totality.

(5) obligate and empower parents to actively and purposefully address the issues affecting the future of their family.

If this result is achieved in even a small proportion of cases, the saving in human and financial terms would be significant.

It would also be consistent with the aspirations of the Hague Convention itself, which provides at Article 7 that

> ***'Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other*** *objects of this Convention.*
>
> *'In particular, either directly or through any intermediary, they shall take all appropriate measures-'*
>
> > *'(c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues.*

Mediation is now established as an important part of the progress of resolving domestic family disputes as an alternative to a battle in court. Governments have endorsed and encouraged it, to the point of providing public funding for it, and virtually to the point of making it compulsory. It not only has the potential to avoid litigation, with its attendant stresses, where this can do further harm to delicate and fraught personal

relationships. It may also save public (and sometimes private) money. The English Court of Appeal, which by definition deals with particularly intractable and entrenched disputes of considerable legal and factual complexity, has now developed its own voluntary mediation facility.

Despite the significant progress made in the role and recognition of mediation in a wide range of domestic disputes, it has not as yet been adopted for cases involving international parental child abduction. The reason such an approach has not been adopted to date is due to the particularly large number, and complexity, of barriers that need overcoming if mediation is to become a realistic option.

The barriers to overcome are as follows:-

1. **Speed**

Hague Convention applications are treated as emergency business by the court, with a statutory objective of final resolution within 6 weeks of commencement. Consequently any mediation has to be organised, effective, and concluded within a lesser period. To mediate after the final hearing is plainly too late, and delaying the Hague process in any substantial way is likely to be unacceptable to the authorities.

2. **International Acceptability**

The importance of the member states reputation as enthusiastic and reliable upholders of the Hague Convention must not be undermined, and any mediation scheme will only work if foreign governments and litigants have confidence in it. Mediation, although accepted in England, has a controversial reputation in some other countries. In the

United States, it is sometimes seen as second-class justice imposed on those who cannot afford proceedings. The conciliation scheme in the German Amstgeriche, which tries Hague cases, appears to dilute the ostensible objective of the Hague proceedings le. to return the children and has given rise to some disquiet among 'left behind' parents.

3. **Accessibility**

In abduction cases one of the parents may not speak the language of the country hearing the Hague application, and will be living abroad. The way he (or she) is introduced to the scheme will be critical to its prospects of success. They must not feel that they are being talked out of their right to pursue an application for a return.

4. **Incentive**

Giving a 'left behind' parent a real incentive to look into the future and negotiate, without derogating from, or suggesting derogation from, his (or her) right to seek a return is a delicate exercise. In particular "left behind" parents are often advised not to talk to, or negotiate with, the abducting parent about the future of their child in case the court interprets this as acquiescence, which is a specific defence to a return under the Hague Convention. Mediation thus must offer a real opportunity to resolve not only the return application but the family issues for the future of contact, schooling etc.

5. **Expertise**

To be effective any mediation scheme must have the endorsement and support of the parties and their lawyers. It is essential that any mediation model be delivered by co-mediators, one lawyer and one non-lawyer mediator. They would require familiarity

with international children's cases, and the ability to liaise effectively with foreign lawyers and governments. Complex questions of fact and law relating to at least two countries will almost always have to be considered by the parties and great care will have to be taken to get it right if a scheme is not to founder. In particular the design of a scheme would have to be such that there was a complete assurance that the mediation could not be construed as acquiescence taking the full cognisance of the decision of the House of Lords - H (Abduction: Acquiescence), Re. HL [1997] 1 872, FLR.

Unlike most domestic disputes, international child abductions can achieve international notoriety. Quite apart from the distress caused to parents and children, any agreement not to seek a Hague return founded on mistaken premises of law or fact following a mediation may achieve celebrity status, and blight any future confidence in such a process.

6. **Enforceability**

Once an agreement has been reached, there must be no difficulty in ensuring that the court hearing the Hague application will accept it, and if appropriate enshrine its terms in an order. Particular attention needs to be paid to ensure the agreement or order is sufficiently formed and understood to prevent it being ignored in a foreign jurisdiction and to avoid unnecessary litigation.

In England and Wales Reunite are undertaking the setting up of a scheme, with a practical pilot scheme to take into account all of the forgoing concerns. It is the first of its kind. It will be limited initially to England, Ireland and France.

The mediation scheme will take place in England and Wales. The parents concerned in pursuing orders for the return of their children will in all cases be entitled to non-means tested legal aid. Mediation will be offered as a means of resolving the dispute, but not as a prerequisite to bring proceedings under the Hague Convention. It is likely that the proceedings will be issued and the mediation take place during the course of a court endorsed adjournment of the proceedings. The German model described earlier, which is not a mediation model, makes mediation a pre-requisite to any Hague Convention proceedings. Accordingly the child is located in Germany, the parent who has abducted is requested to voluntarily return the child first. This has led in some cases to the parent disappearing during the course of that process. Under the Reunite model the existence of proceedings as a backdrop will prevent that happening.

The Scheme will only come into play once it has been endorsed by the Hague Secretariat, the English Central Authority and the Central Authorities of the other project states. The precise detail has to be worked out during the course of the project, it being a fairly complex issue, but it is envisaged that there will be a means of the court being aware that parents are in mediation but with a specific direction (probably in the court rules) to ensure that the willingness of parents to go to mediation is not taken or treated as an indice of acquiescence. Further, the strict rules of the confidentiality of what takes place in mediation will apply. It might be appropriate for the Judge who takes part in the referral of the case to mediation to be disqualified from sitting on the case further.

I have next year to be able to report on the scheme and show:-

- how mediation could work in legal conformity with the principles of the Hague Convention;
- how it is possible to develop a mediation structure that would fit in practically with the procedural structure of an English Hague Convention case;
- test whether such a model would be effective in practice.

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