

INTERNATIONAL RELOCATION OF CHILDREN:
Comparisons and Contrasts between Abduction and Non-Abduction Situations

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Introduction

It seems to have become customary at the outset of academic articles on international family law topics to reference the shrinking globe, an ever more mobile society, and the increased number of international family law situations that result.¹ Regardless of the truth or relevance of such commentary, it is a useful framing technique. After invoking this technique, this article will use a different one, and a different perspective from the academic, to explore two such international family law situations: the parental **abduction** of children, and the parental negotiation and/or litigation of a prospective **relocation** of the children. The technique will be to compare and contrast the two situations; the perspective will be a decidedly personal and anecdotal practitioner's viewpoint. Whereas these two situations can and frequently do arise in the purely intra-country context, this article will analyze them in the international context.

Before launching into detailed analysis, though, some preliminary clarifications may be helpful. For purposes of this article, the term "abduction" will mean where one parent takes a child or children of the parents to another country, with the goal of making

that foreign country the primary home, and without the prior agreement of the other parent or permission of a court. By contrast, “relocation” will mean where one parent seeks through negotiation and/or litigation to obtain agreement of the other parent or a court’s permission to accomplish the same goal. Whereas abduction by this definition usually involves a retrospective attempt by one parent to obtain parental agreement or court permission (or at least acquiescence) to a *fait accompli*, relocation often involves a prospective attempt by the other parent to prevent any future potential abduction. This symbiotic dynamic, separated by opposite timeframe and viewpoint, illustrates perhaps most succinctly the similarities and differences between the two situations. In an abduction situation, one parent seeks to accomplish a relocation after the fact, whereas in a relocation situation, the other parent seeks to prevent an abduction before it occurs. A final clarification is to distinguish both the abduction and the relocation situations from an international **parental move**: where a parent moves to another country without the children, whether with or without first resolving the consequences on parenting of this unilateral act. Out of considerations for scope, length, and time (and because it resists efforts to fit easily into the compare and contrast technique) this article will not address the international parental move, even though it shares some elements with abduction and relocation situations.

Among the main similarities between the two situations, relocation and abduction, are: the importance to society of reducing the negative effects on the children; the involvement of at least two legal systems; the typical reasons given for changing the primary residence of the children and at least one parent; various logistical issues; and the

importance of immigration laws. Among the main differences between abduction and relocation situations are: the perspective (as seen above) of planning vs. reacting; the legal analysis used; the available solution options; the emotional considerations; the level of outside organization involvement; and the advising lawyer's ethical considerations. This article will first examine the similarities, second analyze the differences, and last attempt to draw some conclusions from the first two.

Similarities

Many learned research based articles have examined the effects of relocation and parental abduction on children. These sometimes draw divergent, or even contradictory, conclusions.² Yet it can go without saying - or examination - that the importance to society of seeing its children parented into productive and contributing future citizens is paramount. Whether in addressing a proposed relocation or resolving a past abduction, society needs institutions and processes that result in the best, wisest, and most positive outcomes possible **for the children**. Fulfilling this need requires educated and attuned legal practitioners (and judges, and psychologists, and educators, and legislators, and counselors, etc.).

By definition, international child abduction or relocation each inevitably require some degree of examination, analysis, and application by at least two different legal systems. Sometimes the differences between the legal systems are minimal; sometimes they are enormous. This element almost always requires (ideally) the involvement of lawyers from the two (or more) legal traditions in play. Even subtle differences in the law or legal approach sometimes can result in different outcomes. The differences

between legal systems almost always require some procedural solution or substantive legal wording that is unnecessary in a purely intra-country situation. This occurs even though observation informs that all legal traditions approach family law situations with the same ultimate goal of protecting the children. They just do it with different histories, cultures, societies, languages, economies, etc.

The reasons given by parents for attempting relocation and abduction can be very similar. Reasons given for believing a new primary residence is needed often include more and better family and financial support; escaping a bad or even physically violent relationship; the pursuit of better job opportunities; a new partner; and immigration problems (or some combination of these reasons).³ Absent from the usual reasons given, but not nearly as absent from the actual motivations, is a desire to exclude the other parent from child rearing, whether or not objectively justified. These reasons may explain the desire for a change in the children's primary residence, and still fail to explain fully why a departing parent chooses relocation or abduction over the other.

Logistical similarities between relocation and abduction situations include cultural and language differences between the parents; schedule constraints when countries are in different time zones; consequences of distance, whether across a border, a continent, or an ocean; costs and burdens of international travel; the promise of advances in communications technology; and the effect these all will have on any future parental access schedule. These logistical elements all have to be considered and weighed, whether in negotiating a long-distance parenting plan, or litigating a future contemplated move, or addressing the consequences of an abduction. Language differences especially

can exacerbate the costs and time spent in these situations by requiring some level of translation and interpretation services. Time zone differences can make communications between counsel and courts in different countries difficult, even where no language barrier exists. Distance, of course, brings its own inescapable challenges. How will children go back and forth, will an accompanying adult be required, how will school schedules be accommodated are all questions that require answers. Email, Skype, digital photos and voice recordings, specialized parenting programs and apps, all can ease the burdens of distance, but come with their own limitations, especially when used to substitute for parental presence and involvement. The interplay of these logistical elements presents itself a puzzle within the broader conundrum of resolving how - and where - international families will live.

Immigration laws, whether United States or foreign country, seem to present more obstacles than opportunities in both abduction and relocation situations. This can be true both for the parent seeking to relocate, in the ability to return to the United States, and for the “left behind parent,” in the ability to enter the foreign country (whether urgently, repeatedly, frequently, or for long periods). For children, the benefits of dual or more citizenships (and cultures), where possible, often is a hidden blessing. Dual citizenship for the children, however, also presents one of the hardest risk areas to manage successfully in the abduction arena. Regardless, immigration issues are an aspect that never can be ignored, whether in abduction or relocation situations. Early consultation with competent immigration counsel often is key to obtaining a solid result, both for the parent client and for the children.

Differences

While the shared elements of these two situations are many and striking, the differences are perhaps even more essential and revealing. Among the most basic differences, and perhaps the difference that encompasses all the others, is the difference in time reference and perspective. Relocation involves looking forward and planning and preventive measures (more than abduction). Abduction involves looking back and reacting and remedial measures (more than relocation). One is all about (or mostly) what is to occur; the other is all about (again, mostly) what already occurred. This fundamental difference drives not just the focus, but also the legal analysis, including what laws, facts, motivations, and child development considerations are relevant. This difference also defines the form, structure, and substance of the solution options, and the parents' emotional responses. It also determines who are the secondary players. And it provides the context for the lawyers' ethical obligations.

At least for lawyers, one of the most salient resulting differences is in the legal approach used for a relocation situation as opposed to an abduction situation. This can be as fundamental as the governing legal texts and principles, or as practical as the solution options. Each of these provides an opportunity to highlight the differences between relocation and abduction situations.

In a relocation situation, the legal approach typically begins with an examination of the governing jurisdictional source, which is likely to be the UCCJEA,⁴ with its "home state" definition and strict priority rules. Following this will be the state level best

interest analysis as set out in precedential case law, and any custody or relocation statute, which characterized charitably, lacks uniformity within the United States.⁵ State law may or may not include a presumption for sole or joint custody, and may define these in different ways. State law also may or may not assign the burden of proof as between the parents, whether based on who is the plaintiff, who is the custodial parent, or who is the parent requesting the right to relocate. Relevant factors are many and divers, but will almost inevitably include in large part the reason for the relocation and the level of involvement in the children's lives by the parent who is staying. Questioning of the leaving parent on the effect of an order denying the relocation may or may not be allowed.⁶ None of these legal elements, essential to the "best interest" analysis in relocation situations, are present in the proper legal analysis of an abduction situation – or only rarely.

The legal approach in an abduction situation begins with a much more draconian determination: is the foreign country to which the children were abducted (or wrongfully retained) a signatory (and treaty member with the United States) of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("Hague Abduction Convention") – or not? If the former, at least a (working) legal mechanism for return of the children – and thus hope for the left behind parent – exists (even if compliance is sometimes an issue). If the latter, all hope will rest on diplomatic and local foreign country law, rather than formal and well-defined international legal obligations. A Hague Abduction Convention analysis will begin with well-known legal standards including "habitual residence" and enumerated defenses (which sometimes can seem to be more

subjective in practice than the UCCJEA framework). Wrongfulness, time limits, and issues of domestic violence, criminal consequences, and immigration law can take on exaggerated importance in comparison to the typical relocation situation. So can judicial bias for the home country.⁷

The legal solution options differ greatly between relocation and abduction situations. In relocation, the ultimate solution (although not inevitable) is a decision on where the children will live and at least a rudimentary parenting plan, including an access schedule. The best interest analysis is central to achieving this goal. Ideally, other bells and whistles, including mechanisms for enforcement, modification, and future abduction prevention, are included, whether by negotiation or court order. In the abduction situation, at least under the Hague Abduction Convention, the solution boils down to will the children be returned or not. The relative “niceties” of working out details in a comprehensive parenting plan are usually reserved for afterwards, and best interest analysis is pointedly left out of the equation. Parenting plan considerations are replaced with legal action focused on leverage and pressure, whether from a forced return order, tort claims, or criminal prosecution (and often a combination of all three). This may be less true in non-Hague Abduction Convention cases, but only in those countries where local law offers some chance of a custody award to the left behind parent. Even then, the changed leverage dynamics and vagaries of cultural norms and legal traditions that often are vastly different from those in the United States set these cases apart from the typical relocation situation.

The emotional effects on the parents further illustrate the underlying difference between relocation and abduction and their respective solution options. In relocation, both parents obviously fear losing the children, but this often is attenuated by a process that provides for anticipation and prevention. The leaving parent fears having to choose between staying, feeling trapped, often in an unfamiliar culture far from familial support and financial resources, and leaving the children behind, feeling relegated to a summer and major holidays parent. The staying parent fears either being forced into the same “long-distance-parent” schedule or constantly dreading a possible future abduction. Similarly, the solution options are geared to prevention and optimization. Passport controls, *ne exeat* orders, agreement and order wording on jurisdiction, and bonds or security all are possible as preventive measures. An access schedule, regardless of how bad, and regardless of whether the children stay or go, is part and parcel of the solution discussion, whether by negotiation or litigation. Enforcement issues obviously arise, but these are in a context of planning and strengthening chances of compliance.

The parental fears are different for the abduction situation. They are at once more raw and more limited. The left behind parent fears never again seeing the children; the taking parent, assuming a Hague Abduction Convention case, fears facing custody litigation in an unfamiliar legal system following a return order, while being labeled an abductor, or worse a criminal. Even in a non-Hague Abduction Convention case, the fear of retaliatory self-help abduction by the left behind parent must be ever-present. Added to both cases can be fears of monetary consequences through tort actions, imprisonment,

and exclusion if the child in adulthood returns to the United States for any of myriad reasons, and leaves the taking parent unable to follow.

Another major difference between relocation and abduction is the number and level of outside organizations that typically become involved. The “normal” relocation case involves at its simplest one state level court system. While it is certainly possible to get more than one state involved in an international relocation situation, and even the court system or social services of a foreign country, this is anything but routine. The typical abduction case, however, easily can have central authorities from two countries (often foreign ministries, and in the United States our federal Department of State), non-governmental agencies, such as ICMEC or NCMEC, prosecutors, immigration authorities, and specialized mediation services. Even the judiciary has its own Hague Abduction Convention network.

Finally, the ethical issues for lawyers also reflects the fundamental dichotomy between a relocation situation and an abduction situation.⁸ This is true for the advisor of the leaving parent and for the legal counsel to the staying parent. In the typical relocation situation, lawyers for the leaving parent generally are concerned with the ethical limits of advising about potentially criminal action – illegal taking or retention of children. The ethical boundaries involved include the proper scope of the advice, the duty to advise sufficiently, and the limit between advice and assistance. Lawyers for the staying parent typically are concerned with advising on preventive measures and options in case of criminal conduct by the leaving parent. In the abduction situation, to the extent criminal action is involved it typically has already occurred. The role of the attorney for the

leaving parent then is one of advising on the consequences and best remedial practices related to past potentially (or actually) criminal conduct. The role of the staying parent shifts to advising on and avoiding assistance with potentially criminal retaliatory abduction.

Conclusion

Both relocation and abduction situations present extremely complex, dynamic, and costly puzzles for the parties – and also for their lawyers and the outside institutions and organizations that become involved. Logistical and emotional issues permeate these situations perhaps more than in any other family law situations – which already are widely viewed as being largely emotion driven on the whole. The legal framework is very technical and precise, and at the same time fluid and subjective, with outcomes unpredictable and often turning as much on who the judge is as on the actual facts, legal guideposts, or sociological research.⁹ And at the heart of these situations are the interests not only of the individual children, who often have no deciding voice in how (or in this instance where) their lives will unfold, but also of the societies that depend on and need for these children to develop into productive and contributing future citizens. Those who work in this field have an obligation to learn as much as possible about all the aspects and elements of these cases, and to approach each case based on its individual merits, but with an overall philosophy that is focused on the outcome for the children from the perspective of society in general.

¹ See Robert D. Arenstein, *How to Prosecute an International Child Abduction Case under the Hague Convention*, 30 J. Am. Acad. Matrim. Law 1 (2017); Nicola Taylor & Marilyn

Freeman, *International Research Evidence on Relocation: Past, Present, and Future*, 44 Fam. L. Q. 317 (2010); Samara Nazir, *Comment, The Changing Path to Relocation: An Update on Post-Divorce Relocation Issues*, 22 J. Am. Acad. Matrim. Law 483 (2009); Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 Fam. L. Q. 557 (1998); Richard E. Crouch, *Resolving International Custody Disputes in the United States*, 13 J. Am. Acad. Matrim. Law 229 (1996).

² Taylor & Freeman, *supra* note 1.

³ Nazir, *supra* note 1; see also Ann M. Driscoll, *In Search of a Standard: Resolving the Relocation Problem in New York*, 26 Hofstra L. Rev. 175 (1997).

⁴ For a discussion of the interplay between the UCCJEA and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children see Robert G. Spector, *International Abduction of Children: Why the UCCJEA is Usually a Better Remedy Than the Abduction Convention*, 49 Fam. L. Q. 385 (2015).

⁵ Sally Adams, *Avoiding Round Two: The Inadequacy of Current Relocation Laws and a Proposed Solution*, 43 Fam. L. Q. 181 (2009).

⁶ See Am. Acad. of Matrimonial Lawyers, *Proposed Model Relocation Act*, 15 J. Am. Acad. Matrim. Law 1, at fn. 18 p. 20 (1998); Philip M. Stahl, *Emerging Issues in Relocation Cases*, 25 J. Am. Acad. Matrim. Law 425, 431 (2013).

⁷ See generally, U.S. Department of State annual reports on compliance with Hague Convention obligations, available at: <https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/for-providers/legal-reports-and-data/reported-cases.html>.

⁸ See generally Lewis Becker, *Ethical Responsibilities of a Lawyer for a Parent in Custody and Relocations Cases: Duties Respecting the Child and Other Conundrums*, 15 J. Am. Acad. Matrim. Law 33 (1998).

⁹ Linda D. Elrod, *National and International Momentum Builds for More Child Focus in Relocation Disputes*, 44 Fam. L. Q. 341 (2010).