The Criteria for International Relocation and Application of the Hague Convention to International Abduction Cases

by Robert H. Siegel

On Jan. 30, 2009, the public was introduced to a heart-wrenching story that instantly generated exhaustive tabloid fodder. A *Dateline NBC* segment titled, "Fighting for Sean," hosted by Meredith Vieira, told the incredible unfolding story of the international abduction of then four-year-old Sean Goldman, who was taken to Brazil by his mother. The segment spotlighted Vieira's interview of Sean's father, David Goldman, a resident of Tinton Falls, who was in the midst of a protracted legal battle to regain custody of Sean. The Goldman story provided the public with a rare glimpse into the arcane realm of international relocation/abduction law, which continues to be the source of great aggravation for family law attorneys.

The Goldman saga began on June 16, 2004, when Sean's mother, Bruna Bianchi Goldman, took Sean with her on a flight from Newark to Brazil, purportedly for a brief visit to see her family. Four years after leaving their Monmouth County home for Brazil, in Aug. 2008, Bruna died during childbirth, leaving Sean in the custody of her parents and second husband, a well-connected Brazilian attorney named Joao Paulo Lins e Silva.

Sean's visit to Brazil, which was supposed to last for 20 days, culminated with a decision by Justice Gilmar Mendes of the Federal Supreme Court of Brazil on Dec. 22, 2009, awarding full custody of Sean to David Goldman. By that juncture, the international litigation had spanned from July 2004 to late Dec. 2009, and had included decisions by courts ranging from the family part in Monmouth County to the state Family Court of Rio de Janeiro.

Despite the intense media circus surrounding the case, the litigation served to highlight the procedural analysis that New Jersey courts have developed in deciding international relocation cases. Unlike domestic relocation matters, which are adjudicated at plenary hearings prior to relocation, many international relocation cases are initiated after one party has already absconded to a foreign nation with a child or children.

Procedural Framework

In adjudicating international relocation cases, New Jersey courts undertake the following analysis: First, the courts must have both personal jurisdiction and subject matter jurisdiction to move forward with deciding each individual case on the merits. Second, courts must determine whether there is a "good-faith motive" for the removal, and determine that the move is not "inimical to the child's best interests" by analyzing the move under the factors set forth in *Baures v. Lewis*.[1] The standard of proof for the *Baures* 12-factor test is by a preponderance of the evidence. As part of the 12-factor *Baures* test, courts must determine the applicability of the Hague Convention to determine the child's "habitual residence." The Hague Convention is primarily applicable where one parent has already removed the child to a foreign nation without the consent of the other parent or a court order permitting him or her to do so. Lastly, New Jersey custody statutes are applied, specifically N.J.S.A. 9:2-2 and N.J.S.A. 9:2-4(c), to determine which parent should retain or regain custody of the child(ren).

Application of the *Baures* Factors to International Relocation

In the seminal case of *MacKinnon v. MacKinnon*, a unanimous Supreme Court of New Jersey held that the legal standard for relocation established in case law by the 12-factor *Baures* test should also be utilized to adjudicate applications for international removal.[2] The Court held that both the interstate and international removal contexts involve the "same interests," and thus the *Baures* test "appropriately balances the concerns implicated in either situation."[3]

The *Baures* factors are: 1) the reasons given for the move; 2) the reasons given for the opposition; 3) the past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move; 4) whether the child

will receive educational, health and leisure opportunities at least equal to what is available here; 5) any special needs or talents of the child that require accommodation and whether such accommodation or its equivalent is available in the new location; 6) whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child; 7) the likelihood that the custodial parent will continue to foster the child's relationship with the noncustodial parent if the move is allowed; 8) the effect of the move on extended family relationships here and in the new location; 9) if the child is of age, his or her preference; 10) whether the child is entering his or her senior year in high school, at which point he or she should generally not be moved until graduation without his or her consent; 11) whether the noncustodial parent has the ability to relocate; and 12) any other factor bearing on the child's interest.[4]

In *MacKinnon*, the defendant, Mrs. MacKinnon, requested to relocate with the parties' four-year-old daughter, Justine, to Okinawa, Japan, her home country. After the trial court and Appellate Division granted Mrs. MacKinnon permission to relocate with the child to Japan, the Supreme Court of New Jersey ruled on the issue. In seeking reversal of the lower court rulings, the plaintiff, Mr. MacKinnon, argued that *Baures* provides a good starting point for international removal disputes, but the "implications of an international removal are so distinguishable" from interstate removal that "stricter criteria" should be required to address these allegedly distinctive areas. The Supreme Court disagreed, holding that both interstate and international removal applications involve the "same interests," particularly the ultimate issue of whether the child's interests will suffer from the move.[5] The Court held that because the *Baures* factors can accommodate distinctions between interstate and international removal contexts, the *Baures* standard also provides "flexibility" to courts in determining the appropriateness of foreign removal. The Court also held that due to the inherent complexity of international removal cases, New Jersey courts called on to decide them should apply *Baures* "expansively" to adapt to international circumstances.[6]

In *MacKinnon*, the Court relied heavily upon the report of a court-appointed family psychologist, who testified that if Mrs. MacKinnon were not permitted to return to Japan, her depression would "negatively impact" Justine.[7] The expert also stated that Justine, who was bilingual and had a dual citizenship, was capable of handling the adjustment of relocating to Japan. Therefore, the Court had ample support to affirm the ruling of the lower courts that Justine's best interests would be served by a move to Japan.

New Jersey courts have not analyzed each of the 12 *Baures* factors in the international relocation cases that have come before the courts, instead deciding each case based on its unique facts and circumstances and applying the factors that relate to those circumstances. However, the trend has been that an overall analysis of the *Baures* factors hinges on whether a proposed move is in the child's best interests. In making this determination, the standard of proof applied by the courts is by a preponderance of the evidence.

Case Law Background and Origins

On Feb. 17, 2011, Judge Michael A. Guadagno, of the Monmouth County Family Part, in an unpublished decision, decided a complaint filed by Sean Goldman's maternal grandparents seeking visitation with Sean. In the unpublished opinion, which denied the grandparents' request for visitation, the trial court relied heavily on the analytical framework first established by the Appellate Division as part of its decision in *Innes v. Carrascosa*.[8] Notwithstanding the "contemptuous actions" previously taken by Sean's maternal grandparents, as well as his mother's second husband, Judge Guadagno's opinion focused on the relevant legal analysis set forth in *Innes v. Carrascosa*.[9]

In *Innes*, the parties were married on March 20, 1999, and during their marriage resided in West New York, New Jersey. The parties had a daughter, Victoria, who was born in Secaucus on April 17, 2000, and held dual citizenship in both the United States and Spain. Victoria attended a parochial school in Fort Lee during the parties' marriage.

In early 2004, the parties separated, and shortly thereafter the defendant, Maria Jose Carrascosa, took the child to Spain and filed for an annulment of the marriage with the Ecclesiastic Tribunal of the Archdiocese of Valencia, Spain. Plaintiff Peter Innes filed an opposition to the annulment, and subsequently filed a complaint for divorce in the family part in Bergen County on Dec. 10, 2004.

On Oct. 8, 2004, the defendant forwarded an agreement to the plaintiff regarding various parenting time issues. The agreement, which was signed by both parties, also stated that "neither Carrascosa nor Mr. Innes may

travel outside of the United States with Victoria Solenne [daughter] without the written permission of the other party."[10]

On or about Jan. 12, 2005, the defendant took Victoria to Spain without the written consent or knowledge of Mr. Innes. On Jan. 19, 2005, Mr. Innes applied to the superior court for joint custody of Victoria, and enforcement of his visitation rights pursuant to the Oct. 8, 2004, agreement.

As part of her attempt to gain custody of Victoria, Ms. Carrascosa filed a Hague Convention application with the Family Court of Valencia. The Spanish court then ordered five-year-old Victoria to be examined by a psychologist to determine her best interests. The psychologist concluded it was in Victoria's best interests to maintain a relationship with both parents in order to avoid any risk to the child's "psycho-emotional" development.[11]

The New Jersey trial court and Appellate Division would ultimately repeat the findings of the psychologist in ordering the return of the child to her home state of New Jersey.

Ascertaining Personal and Subject Matter Jurisdiction in International Relocation

Personal Jurisdiction

In order for the New Jersey Superior Court to proceed with addressing an international custody dispute such as the complex issues presented in *Innes*, personal jurisdiction must be established over the party seeking to relocate outside the United States with the child. The most basic analysis of personal jurisdiction focuses on the residence of the parties at the time of filing the complaint for divorce. The parties in *Innes* each filed separate complaints in different countries, thereby complicating the residency element.

Where an issue exists regarding determining personal jurisdiction, the Appellate Division has stated that courts should be "guided by the fairness of the choice of forum from the defendant's viewpoint. That is, the court must look to a defendant's connection to the forum and whether it is fair—in the constitutional sense—for the defendant to be haled into the forum to litigate the dispute."[12] More specifically, in the matrimonial context, the test is whether there exists a "sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum."[13] This test involves a consideration of whether a defendant has had the "requisite minimum contacts" with New Jersey.[14]

The exercise of personal jurisdiction must also comport with notions of "fair play and substantial justice."[15]

Subject Matter Jurisdiction

Once personal jurisdiction has been sufficiently established over the defendant, the court must determine whether it has subject matter jurisdiction to adjudicate the custody dispute. The relevant *bona fide* resident standard is set forth in N.J.S.A. 2A:34-8, which states that the "Superior Court shall have jurisdiction of all causes of divorce, dissolution of a civil union, bed and board divorce, legal separation from a partner in a civil union couple or nullity when either party is a bona fide resident of this State."

The *bona fide* resident standard is synonymous with being a "domiciliary" of New Jersey, whereby the plaintiff or defendant must be domiciled within New Jersey for the courts to adjudicate the matter in controversy.[16] An individual's choice of domicile is established by "physical presence" coupled with the "concomitant unqualified intention to remain permanently and indefinitely."[17] In the context of international custody disputes, the term "habitual residence" has also become synonymous with *bona fide* resident, and must be addressed in order to assess whether subject matter jurisdiction exists in a particular case.

Once the defendant mother in *Innes* was determined to be a domiciliary of New Jersey by the superior court, New Jersey had the authority to make custody determinations in the case. The superior court also determined there was a sufficient connection between the defendant mother and New Jersey to hale her into court in the state. Therefore, both personal and subject matter jurisdiction were present to permit the case to proceed in New Jersey.

Modifying a Custody Agreement to Prevent International Removal

In 2003, the New Jersey Appellate Division faced a matter of first impression when a party to a previously agreed upon property settlement agreement (PSA) attempted to modify the custody terms of the agreement to prevent an ex-spouse from exercising parenting time in Lebanon, which is not a signatory to the Hague Convention. The parties' PSA had permitted the plaintiff ex-husband, a plastic surgeon, to exercise one month of parenting time each summer with the parties' daughter in his home country of Lebanon.

In *Abouzahr v. Matera-Abouzahr*, the Court held that it would *not* adopt a "bright-line rule prohibiting out-of-country visitation by a parent whose country has not adopted the Hague Convention or executed an extradition treaty with the United States."[18] The Court held that such a rule would unnecessarily penalize a "law-abiding parent," and could conflict with a child's best interests by depriving the child of an opportunity to share his or her family heritage with a parent.

The Court noted that while the parties' agreement referenced the Hague Convention, "that international agreement gives no remedy to assuage" the fear of the defendant ex-wife.[19] The Court pointed to the jurisdictional requisite of the Hague Convention, which states that all nations involved must be signatories to the convention. Lebanon, like every other Middle East nation aside from Israel, is not a signatory to the Hague Convention.

In addition, as explained during the plenary hearing in *Abouzahr*, under Muslim law the father automatically has custody of a daughter over the age of nine, notwithstanding how he gained custody in the first place. Family matters in Lebanon are under the jurisdiction of the religious courts of Lebanon, which is a Sunni Muslim Court.[20]

Despite these concerns, New Jersey courts in international relocation cases continue to focus on the child's best interests. In *Abouzahr*, the courts added a new wrinkle, setting forth the principle that depriving the child of an opportunity to enjoy his or her family heritage is tantamount to negatively impacting the child's best interests.

The *Abouzahr* case demonstrates that while the Hague Convention, detailed further below, can be a helpful tool for resolving international custody disputes, it is often at the mercy of whichever country a child has been removed to. In addition, the best interest standard continues to apply, notwithstanding the impact, or lack thereof, of the Hague Convention.

Application of the Hague Convention and the Definition of Habitual Residence

On Oct. 25, 1980, the Hague Convention on the Civil Aspects of International Child Abduction was established at the Hague in the Netherlands. As previously stated, the Hague Convention is normally applicable where one parent in an international removal case travels with a child overseas without a court order or the consent of the other parent.

The Hague Convention was implemented as a federal statute in the United States in 1988 as the International Child Abduction Remedies Act (ICARA).[21] Congress subsequently enacted the International Parental Kidnapping Crime Act (IPKCA), which made it a federal offense punishable by up to three years imprisonment for a parent to wrongfully remove a child from the United States.[22] The convention now has approximately 70 signatory nations.

A Hague Convention proceeding is a civil action brought in the country to which a child (under the age of 16) has been "wrongfully removed" or "retained."[23] Each country that is a signatory to the Hague Convention designates a central authority, a specific government office that carries out specialized convention duties. The Department of State is the U.S. central authority for the convention.[24]

The convention applies only between contracting states, and only when the 'wrongful' abduction occurs after the convention is in force between those states. The convention mandates the prompt disposition of each and every Hague-related case.[25] The convention stipulates that if the judicial or administrative authority has not reached a decision within six weeks from the date of the commencement of the proceedings, the petitioner or the central authority of the requested state has the right to seek an explanation of the reasons for the delay.[26]

The key articles of the Hague Convention as they relate to wrongful international abductions are Articles 3(a) and (b) and Article 12. Article 3 of the convention describes a removal or retention to be wrongful where:

> (a) It is in breach of rights of custody attributed to a person, an institution, or any other body under the law of the state in which the child was habitually resident immediately before the removal or retention *and* (b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Neither the Hague Convention nor ICARA define "habitual residence," and therefore the courts have been left to interpret that open-ended phrase.

While the Hague Convention has been implemented as a federal statute, Hague cases can be adjudicated in

both state and federal courts. The U.S. Court of Appeals for the Third Circuit has had the opportunity to define "habitual residence," and their interpretation has been relied upon by the New Jersey Appellate Division in cases such as *Innes*.

In *Feder v. Evans-Feder*, the Third Circuit defined habitual residence as the "place where the child has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective."[27] Courts have also recognized it to be "practically impossible" for a very young child to acclimatize independent of the immediate home environment of the parents.[28]

Article 12 of the convention states, in pertinent part: "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith." Article 12 is wholly dependent on whether the two-pronged elements of Article 3 have been breached.

In *Innes*, the Spanish Court of First Instance erred in rejecting Mr. Innes' Hague petition, using an improper legal analysis to arrive at their conclusion. Rather than examining the habitual residence of the child, the Spanish Court of First Instance instead focused on the party with custody of the child at the time the child was removed to Spain. The New Jersey Superior Court in *Innes* ultimately determined that it had jurisdiction over the parties, and venue was proper in Bergen County, which was the residence of the parties at the time of filing of the divorce complaint.

As to the issue of application of the Hague Convention, the superior court found that the Spanish Court had improperly used the Hague Convention to make a custody determination, rather than simply ascertaining the child's habitual residence.

In *Friedrich v. Friedrich*, the U.S. Court of Appeals for the Sixth Circuit, in an opinion delivered by Circuit Judge Danny Boggs, held that the intent of the Hague Convention is to "restore pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court," not to make custody determinations or judge behavior regarding whether it rises to the level of "chutzpah."[29]

The *Friedrich* case involved an attempted relocation from Germany to Ohio, where the mother of the two-year-old child attempted to take the parties' son back to the U.S., where her family resided. The plaintiff father filed an action in the U.S. District Court for the Southern District of Ohio seeking to compel the child's return to Germany.[30]

The mother attempted to defend her removal of the child, which was initially found to be wrongful by a German court, by relying on the narrow defense provided for in Article 13(b) of the Hague Convention.[31] This defense to wrongful removal, which must be proven by clear and convincing evidence, states that there is a "grave risk" that the return of the child would expose him or her to physical or psychological harm. The mother's removal was ultimately determined to be wrongful, and she was ordered to return the child to the father in Germany.

The issue of compliance with the Hague Convention and the effectiveness of its provisions will continue to create controversy as countries with whom the United States has strained relations (specifically China, Russia, and every Middle East country aside from Israel) refuse to join the convention. It was most recently as a result of the Goldman case the Hague Convention received significant criticism based largely on the perceived ineffectiveness of the convention in streamlining the legal process for international child abductions. In a *Washington Times* article dated June 19, 2009, titled, "Will Brazil do the right thing?" U.S. Congressman Chris Smith of New Jersey singled out Brazil for its "patterns of noncompliance" with the Hague Convention.[32]

Application of New Jersey Custody Statute

As explained above, the Hague Convention does not "seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children" to their home countries. The convention is a "starting point when faced with the issue of whether a child has been illegally removed from his or her home country, or is being illegally retained in another country."[33]

Once it is determined that a particular country is a child's habitual residence and the child should be returned there, a custody determination is left to "the law of the state to which the child is returned."[34] Any subsequent decision on enforcement or modification of the relevant

custody dispute or decree is left to the appropriate judicial or administrative agency of the child's home state.

In the *Innes* case, after the court fully addressed the Hague Convention, the family part immediately turned to New Jersey's custody statutes, specifically N.J.S.A. 9:2-2 and N.J.S.A. 9:2-4, in order to make a custody determination based upon the "best interests of the child" standard.[35] Pursuant to N.J.S.A. 9:2-2, "When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this State, or have resided five years within its limits, they shall not be removed out of its jurisdiction... while under that age of consent without the consent of both parents, unless the court, upon cause shown, shall otherwise order."

N.J.S.A. 9:2-4(c) states:

> In making an award of custody, the court shall consider but not be limited to the following factors: the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children. A parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.

New Jersey courts have clearly expressed the principle that wrongful removal of a child outside the United States is against the child's best interests. The New Jersey Legislature has also declared that it is "in the public policy of this State to assure minor children of frequent and continuing contact" with both parents after the parents have separated or dissolved their marriage."[36]

In awarding Mr. Innes sole legal and residential custody of the minor child, the trial court considered the N.J.S.A. 9:2-4(c) factors. The Appellate Division affirmed the trial court's custody determination, due, in part, to the defendant mother's refusal to cooperate with the child's father, as well as numerous court orders directing her to return the child to the United States.

Conclusion

With the 12-prong *Baures* test now firmly ensconced in international removal cases, New Jersey courts can be guided by the principles set forth in the cases detailed above as they seek to establish a clear set of international relocation criteria. Cases such as *Innes* and *Abouzahr* demonstrate that above all else, courts will continue to look to what custody arrangement is in the child's best interests in determining whether to permit international relocation.

With respect to the Hague Convention, a proper analysis of its impact should be placed in the context of its limited applicability. The Hague Convention should be viewed as a guidepost for international custody disputes, not a cure-all statute.

Despite the fact that a majority of the world's most influential countries, with some notable exceptions, have joined as signatories to the Hague Convention, the fact remains that international custody disputes are inherently difficult to litigate. ■

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