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Child Relocation 2024

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Global Practice Guides

Child Relocation

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2024

Chambers Global Practice Guides

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Published by
Chambers and Partners
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London
EC4A 2AE
Tel +44 20 7606 8844
Fax +44 20 7831 5662
Web www.chambers.com

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INTRODUCTION

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Hughes Fowler Carruthers is widely regarded as one of London's leading divorce and family law practices. Established more than 20 years ago, the firm specialises in ultra-high net worth and high-profile cases, especially those with international aspects. Hughes Fowler Carruthers retains its long-established Band 1 ranking in Chambers and Partners, with four partners ranked in Band 1 or as "star individuals" and three other lawyers individually ranked – although all partners are highly experienced and top rated in every aspect of family law. The firm's lawyers also have in-depth knowledge of many foreign jurisdictions and excellent overseas contacts. Hughes Fowler Carruthers is the firm of choice for high value prenuptial and post-nuptial agreements – especially those with cross-jurisdictional aspects – and is renowned for keeping clients, their businesses and cases away from the glare of publicity. The firm's lawyers have extensive experience in mediation and collaborative approaches but are also highly expert litigators when a more robust approach is required.

Contributing Editor

Alex Carruthers is a founding partner at Hughes Fowler Carruthers. He specialises in divorce and financial work and in children's work (particularly international cases). His clients are high net worth individuals with complex legal issues, including trusts and jurisdictional disputes. Alex continues to be highly commended by Chambers and Partners for his expertise. Both Chambers UK 2023 and Chambers High Net Worth 2023 reconfirmed Alex's Band 1 ranking – with the former commenting on his "really good judgement on cases" and the latter recognising him as "someone [to] go to with a really knotty problem".

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INTRODUCTION

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SOLICITORS

Global Overview of Child Relocation in 2023

When a marriage or other form of intimate relationship breaks down, one or both parties may want to make a change in their lives. For some, this may mean returning to their home country, starting afresh in a new country, pursuing a new relationship, or seeking out a particular employment opportunity. This desire for change often leads to one parent wishing to relocate – either within a country or between countries – and is arguably becoming an increasingly common issue, owing to the rise of globalisation and cross-cultural relationships. Whatever the reasons, such a move directly impacts upon the children of divorcing or separated couples and presents the question: how can such a move be made possible?

Internal and international relocation

Among the multitude of reasons why people choose to move, returning "home" to the country they came from and forging a new relationship with someone from another country are particularly common. In deciding between countries, a compromise must be reached about where to live. Even once a decision is reached, it might then become necessary to relocate for work – a factor that still disproportionately affects men.

In international families, one party will have to live in the country of the other. When they split up, the decoupling process works in reverse and this potentially makes the issue of relocating children more acute. Obviously, these issues do not just affect the nuclear family – they also apply to blended families and in the case of adopted children, where different considerations may apply from country to country.

Deciding to relocate with a child following the end of a relationship can be difficult in many ways and the laws relating to relocation will vary between jurisdictions. In many countries, such as England and Wales, a parent cannot relocate with a child (whether internally or internationally) unless the other parent consents or there is a court order permitting the relocation. In other countries, such as the USA, there are different legal jurisdictions within the same country. The laws in some states presume that a custodial parent has the right to change the residence of a child unless the other parent can provide evidence to convince the court that such a move would be detrimental to the child, whereas other states first require consent or a court order. This can make it very difficult for one party to leave the state and move elsewhere in the country.

INTRODUCTION

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It is self-evident that relocation cases are regarded as some of the most contentious and challenging to come before the family courts. Notwithstanding the complexities that arise, the number of such cases continues to increase for the reasons identified earlier. Given that the process can be slow and sometimes cumbersome in some countries, timing is very important so as to avoid unnecessary delays.

Although the key considerations typically remain the same, different jurisdictions vary in how they balance the right of the primary carer (often the mother) to go to a place where she would prefer to be against the change to the child's relationship with their father. In trying to achieve the right balance between the two, the law may be a blunt instrument – given that the factual narrative of each relocation case is, by definition, unique and distinctly human. It can also be a costly exercise.

Choosing to use the courts to deal with issues relating to children can be a bit of a sledgehammer and an expensive one, too – requiring people to spend their hard-earned savings on trying to ensure that they will see their child again or potentially prevent the child from moving to another country. The opportunity to instruct good legal counsel will depend on the availability of legal aid in different countries. In some countries, these issues can be resolved without the need to involve the court – for example, through mediation or arbitration.

The key consideration in such cases is often the welfare of the child. The weight placed on such issues and evaluating what is in the child's best interests will depend on the jurisdiction. In England and Wales, the courts must weigh up various factors, such as:

- the child's wishes and feelings;
- the child's sex and background;
- the child's physical, emotional and educational needs; and
- the likely effect on the child of a change in circumstances.

This list is non-exhaustive.

The age of the child or children will often be a key consideration in jurisdictions that take account of their wishes and feelings. The impact on the child is likely to increase with age – for example, a 15-year-old is typically more able than a five-year-old to articulate and express their desires about their relationships with their parents. Again, the weight of that evidence can be apportioned quite differently in each jurisdiction and the degree to which that is factored into a court's decision-making process varies. Where different children express strongly different wishes, this might result in families/siblings being split up.

There are other factors external to the child that may be relevant as well, such as the potential harm that could be caused to the primary carer of a child who is refused permission to relocate. It is widely accepted that it is important for a child to have a relationship with their non-resident parent; however, it is similarly important for the child to have a principal carer who is psychologically stable and emotionally well.

Practical considerations (eg, the size of a country and the distance between locations) can also be significant. Moving from one side of Australia to the other, for example, could have a distinct impact on a child. Travelling times can also be material. It may well be quicker and easier for one person to travel from London to visit another in Paris than it is to go to Northumberland. This leads to the question: is it more damaging to a child to move to Northumberland than it is to go

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to an easily accessible part of a foreign country such as France?

Post-Brexit, the UK is no longer subject to EU regulations. Potential issues might therefore arise in relation to an order previously made by an EU country in terms of enforceability. Equally, the removal of freedom of movement now makes it harder for people (particularly EU citizens) to spend significant time in the UK. Immigration has also become a more challenging issue in the UK, which makes some practicalities more difficult, whereas movement within the EU remains straightforward.

It should be noted that recent changes to the Family Procedure Rules now require parties to consider non-court dispute resolution before issuing private law applications relating to children. This pre-action protocol will apply to parties wishing to make a relocation application and it is therefore important to get advice at an early stage.

Child abduction

Where permission to relocate is not obtained (whether through the court or otherwise), the relocation of a child can result in child abduction. This is a criminal offence in many countries and the child's return will often be governed by the terms of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the "1980 Hague Convention"), a multilateral treaty relating to international child abduction and supplemented by the Hague Convention on parental responsibility and protection of children ("HCCH 1996"). As of 2022, there were 103 parties to the 1980 Hague Convention, including most Western countries and many others that have internationally recognised legal systems. Some countries, including India, Bangladesh and the UAE, are not signatories to the 1980 Hague Convention. Certain countries that are signatories (eg, Russia, Turkey and Mexico) may not always demonstrate compliance. This guide aims to deliver some understanding of the broad principles that apply in such cases. In reality, the application of the 1980 Hague Convention within countries that are signatories will differ.

The 1980 Hague Convention protects children from the harmful effects of abduction (ie, wrongful removal and retention across international boundaries) by a parent. It encourages the prompt return of abducted children to their country of habitual residence and provides a procedure to bring about their return.

In essence, the 1980 Hague Convention operates on the principle that if there is a relocation without the consent of both parties, the child should be returned to the country from which they were taken and any decisions about the child's future residence and living arrangements should then be taken in that country. The existence of the 1980 Hague Convention demonstrates that the international community recognises the scale of the problem and the pressing need for there to be a mechanism for returning children.

Parents are best advised to act quickly to prevent an abduction if they believe that their child may be at risk – for example, by obtaining an order preventing removal where available. Once a child has been wrongfully removed, the legal mechanisms for forcing a return can be protracted and require applications in various jurisdictions. It is better to act pre-emptively to avoid this difficult, lengthy and expensive process.

Relocation applications are only going to become more frequent as the world gets smaller and smaller and this will undoubtedly continue to be an issue with which all countries are going to have to grapple. And many parents, too.

AUSTRALIA

Law and Practice

Contributed by:
Eleanor Lau, Skye Owen and Katarina Burdett
Lander & Rogers

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Lander & Rogers is a leading Australian law firm, comprising over 700 people, including 100 partners, across seven areas of practice. The family and relationship law group is the largest in Australia, with the highest number of family law Accredited Specialists of any firm in Australia. With offices in Melbourne, Sydney and Brisbane, Lander & Rogers provides specialist advice, both nationally and internationally, in all areas of family law, including divorce, financial agreements, property settlements, parenting, relocation and maintenance. It regularly represents clients in matters involving cross-jurisdictional issues involving countries such as Singapore, China, Hong Kong, the United Kingdom, Europe, the USA, the UAE and more. It has language expertise in Mandarin, Cantonese, Korean, Greek, Hebrew, Spanish and Hokkien. The firm is a member of the International Academy of Family Lawyers (IAFL) and can draw on specialist corporate advice from its commercial practice groups to assist family law clients.

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LANDER & ROGERS

1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

The Constitution in Australia confers power on the Commonwealth ("Federal Government") to make laws with respect to parental responsibility, primarily through the Family Law Act 1975 (Cth) ("Family Law Act").

Parental responsibility is a parent's authority to make decisions in relation to major long-term issues affecting the care, welfare and development of a child. It is defined under Section 61B of the Family Law Act as "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children".

Major long term-issues are defined under Section 4(1) of the Family Law Act as being issues relating to the "care, welfare and development of a child of a long term nature", which can include the child's education, religious and cultural upbringing, health and name, and changes to living arrangements that make it significantly more difficult for the child to spend time with a parent.

When a child is born, each birth parent ordinarily has joint parental responsibility for the care, welfare and development of the child until the child is 18 years of age. This responsibility continues irrespective of any changes in the nature of the relationships of the child's parents (such as the child's parents becoming separated or by either parent marrying or remarrying).

However, the Federal Circuit and Family Court of Australia (the "Court") has the power to make a parenting order allocating parental responsibility for a child until the child is 18 years of age. A parenting order does not expressly diminish any aspect of the parental responsibility, except to the extent it is expressly provided for in the order or necessary to give effect to the order.

As of 6 May 2024, the law with respect to making parenting orders in relation to a child in Australia has changed significantly (the "amendments"). Prior to the amendments, the Court was required to apply a presumption that it was in the child's best interests for the parents to have equal shared parental responsibility for the child – that is, both parents are required to agree on major long-term issues for the child.

The amendments sought to remove the requirement for the Court to consider making an order that the child spent equal or substantial and significant time with each parent if an order for equal shared parental responsibility was made. This was because the requirements were often incorrectly interpreted as being a right by a parent to have equal time with a child. The amendments also removed references to equal shared parental responsibility, and instead refer to joint decision-making or sole decision-making.

The new amendments now provide that any allocation of responsibility for major long-term issues is based on what is in the child's best interests. When determining the best interests of the child, the Court will consider the following six factors of equal weighting:

- what arrangements would promote the safety of the child (including safety from family violence, abuse, neglect or other harm) and of each person who has care of the child (whether or not a person has parental responsibility for the child);
- any views expressed by the child;
- the developmental, psychological, emotional and cultural needs of the child;

- the capacity of each person who has or is proposed to have parental responsibility for the child to provide for the child's developmental, psychological, emotional and cultural needs;
- the benefit to the child of being able to have a relationship with the child's parents and other people who are significant to the child, where it is safe to do so; and
- anything else that is relevant to the particular circumstances of the child.

Pursuant to Section 61DAA, if the Court makes a parenting order that provides for joint decision-making about any issue, parents are required to consult each other in relation to each major long-term decision and make a genuine effort to come to a joint decision.

Despite a parenting order allocating joint parental responsibility for a child, there is no requirement for a parent to consult on issues that are not major long-term issues whilst the child is in their care.

If the Court does not consider it to be in the child's best interests for the parents to have joint decision-making in relation to all major long-term issues, the Court may confer sole decision-making in relation to parental responsibility on one parent to the exclusion of the other. If one parent is conferred with sole decision-making, they are permitted to make all the major long-term decisions for the child without consulting the other parent.

The Court can also order that one parent has sole decision-making in relation to specified issues but confer joint decision-making in relation to all other major long-term issues.

In the absence of court orders, parents automatically have parental responsibility for a child and are encouraged to consult with each other about major long-term issues if it is safe to do so. This provision is not enforceable, but merely acts as a guide to litigants in the absence of court orders.

1.2 Requirements for Birth Mothers

A birth mother inherently retains parental responsibility for a child when the child is born. The only exception would occur in circumstances where the Court allocates sole decision-making to another person.

1.3 Requirements for Fathers

A birth father inherently retains parental responsibility for a child when the child is born, except in the following circumstances:

- the Court allocates sole decision-making to another person; or
- the birth father has donated sperm for the child's conception through an artificial conception procedure and is not married to or in a de facto relationship with the birth mother at the time of conception.

1.4 Requirements for Non-genetic Parents

A non-genetic parent may include a step-parent or adopted parent of a child. Non-genetic parents do not automatically have parental responsibility for a child, but must obtain a parenting order from the Court, including an order for either sole or joint decision-making responsibility. If a child is adopted, an adoption order from the Supreme Court of the relevant State in Australia will be made, which will then permanently confer all legal responsibilities for the child on the adopted parents, including parental responsibility.

If the non-genetic parent is classified as the "other intended parent" for the purposes of Section 60H(1) of the Family Law Act, the non-genetic parent will also automatically have parental responsibility for the child upon the child's birth.

A non-genetic parent will be classified as the "other intended parent" if they were:

- married or the de facto partner to the birth mother at the time the artificial conception procedure occurred; and
- the birth mother and the other intended parent consented to the procedure being carried out, and any other person who provided genetic material consented to the use of the material in the artificial conception procedure; or
- under a prescribed law of the Commonwealth or the State, the child was a child of the birth mother and the other intended parent.

If a person other than the birth mother and the other intended parent (such as a sperm or egg donor) provides genetic material, the child is not the child of the provider of the genetic material.

Grandparents or any other person who is concerned about the care, welfare or development of a child can also apply for a parenting order that confers either joint decision-making or sole decision-making on that person.

If the Court is considering making a parenting order (which includes the allocation of parental responsibility) by consent in favour of a non-parent who is not a parent, grandparent or relative of the child, the Court must not make the order until the parties have attended a conference with a family consultant or until the Court is satisfied that there are circumstances that make it appropriate for the proposed order to be made without attending with a family consultant.

1.5 Relevance of Marriage at Point of Conception or Birth

A child's biological parents automatically have parental responsibility for the child after the child has been born. The relationship of the biological parents, including whether they are married, separated or have never been in a relationship, is not relevant to the conferral of parental responsibility following the birth of a child.

Marriage and de facto relationships are relevant at the point of conception in relation to artificial conception procedures (as outlined in **1.4 Requirements for Non-genetic Parents**) and in relation to presumptions of parentage that the Court may apply in determining who is a child's parent in the absence of direct evidence. For example:

- a child born to a woman while she is married is presumed to be a child of the woman and her husband; and
- a child born to a woman between 20 weeks and 44 weeks after the woman cohabited with a man to whom she was not married is presumed to be a child of said man.

1.6 Same-Sex Relationships

Please see **1.4 Requirements for Non-genetic Parents** regarding the process of obtaining parental responsibility for parents in a same-sex relationship. Provided those requirements are met, the process of obtaining parental responsibility is intended to be the same as for parents in a heterosexual relationship.

Once parental responsibility has been conferred at birth, each parent has parental responsibility, unless the Court makes other orders. No prefer-

ence is given to a biological parent under the Family Law Act, mainly because the Court considers the child's best interests as a paramount consideration rather than the circumstances of the child's conception or the gender of the child's parents.

A provider of genetic material, such as a sperm donor, who has given consent to the use of their genetic material has no automatic parental responsibility for a child born as a result of an artificial conception procedure.

However, a sperm donor may still apply to the Court for parenting orders, including declarations as to parentage, if the donor is actively involved in the child's life, fulfils the roles and responsibilities of a parent, and is perceived by the child as a parent or "dad". It is unlikely, however, that a sperm donor could be included on a child's birth certificate if the birth mother and the other intended parent were already named. This is because birth certificates in Australia are currently restricted to recording only two parents.

A same-sex couple using a surrogate to conceive a child are required to apply to a prescribed Court for the purpose of transferring legal parentage from the surrogate mother and her spouse (if any) to the intended parents. Once the order is made, the intended parents will be regarded as the legal parents of the child and will assume parental responsibility. All states in Australia, with the exception of Western Australia, permit access to surrogacy for same-sex couples and single men. The Western Australian government, however, is expected to introduce a law reform to ensure equal access to surrogacy.

1.7 Adoption

Adoptive parents (excluding step-parents or de facto step-parents) are required to make an application directly to the Supreme Court of the relevant State in Australia seeking an order for adoption (adoption order).

However, if a step-parent or de facto spouse of a parent seeks to adopt a child, an application must first be brought in the Court, seeking permission to commence adoption proceedings in the State Court. In determining whether to grant this permission, the Court must assess whether there is a real possibility that an adoption order will be made by the State Court, and consider whether granting permission would be in the child's best interests by considering the following factors:

- what arrangements would promote the safety of the child (including safety from family violence, abuse, neglect or other harm) and of each person who has care of the child (whether or not a person has parental responsibility for the child);
- any views expressed by the child;
- the developmental, psychological, emotional and cultural needs of the child;
- the capacity of each person who has or is proposed to have parental responsibility for the child to provide for the child's developmental, psychological, emotional and cultural needs;
- the benefit to the child of being able to have a relationship with the child's parents and other people who are significant to the child, where it is safe to do so; and
- anything else that is relevant to the particular circumstances of the child.

If the Court is satisfied that permission should be given, an application can then be made by the potential adoptive parent to the relevant Supreme Court.

In direct applications to the Supreme Court, and applications to the Supreme Court with leave from the Federal Circuit and Family Court of Australia, once an adoption order is made, legal parentage of the child is transferred from the birth parents to the adoptive parents. The child's birth certificate is also changed to reflect the names of the adopted parents.

In relation to intercountry adoptions, Australia has signed the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption dated 29 May 1993. This means that intercountry adoptions are facilitated through Australian adoption programmes and support agencies that liaise with specific countries that are also parties to this Convention. Australia will also facilitate intercountry adoptions if there are bilateral agreements in force.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

If there is a court order allocating sole decision-making responsibility for the child to one parent, that parent does not need consent from the other parent to permanently relocate the child to a new country, unless the sole decision-making order excludes relocation decisions.

If both parents have parental responsibility, and one parent wishes to move a child to a new country, that parent must first obtain the consent of the other parent or a court order permitting the relocation. There may be exceptional circumstances where consent or a court order are not required in the first instance, including where there is a grave risk of physical or psychological harm to the child in remaining in that country.

2.2 Relocation Without Full Consent

A change to a child's living arrangements, such as an overseas relocation, that makes it significantly more difficult for a parent to spend time with the child is considered a major long-term issue.

Therefore, if a parent who holds joint parental responsibility for a child does not consent to the child relocating to another country, the parent seeking to relocate the child's residence would need to make an application to the Court seeking permission to relocate the child overseas.

If the child was relocated to another country without such an Order, an application could be brought for the return of the child to Australia under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the "Hague Convention").

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

In determining relocation cases, the Court must have regard to what is in the child's best interests by considering the factors set out in Section 60CC of the Family Law Act (see **1.1 Parental Responsibility**) and by carefully considering the proposals of each of the parties. Whilst the child's best interests remain the paramount consideration for the Court, they are not the only consideration.

Relocation cases are not a separate category of parenting cases, and the Court must not treat relocation as a "discrete issue". The Court is also not confined to the proposals of the parties but is required to consider all possible options when a parent is seeking to relocate with a child.

It is well-settled law in Australia that a parent seeking to relocate the residence of a child is not required to demonstrate "compelling reasons" for the proposed relocation. However, if a parent is seeking to relocate, it is important to establish a link between the parent's wish to relocate and the welfare of the child. To do this, the proposal to the Court must be detailed, clear and specific, and not speculative. The evidence must support a finding that an improvement in that party's situation, by relocating, will impact positively on the child.

Although the law with respect to relocation matters is relatively settled in Australia, the recent amendments to the Family Law Act mean that the outcomes of relocation applications will be difficult to predict pending decisions being made by the Court.

However, by applying existing case law, it is likely that the following steps will be undertaken by the Court in determining relocation applications:

- identify and consider the competing proposals of the parents;
- identify the key issues in dispute;
- consider the Section 60CC factors in determining what is in the child's best interests; and
- assess the parties' competing proposals, including the advantages, disadvantages and practicality of the proposals, in deciding where the child should live and what orders are in the best interests of the child.

By following this process, the Court is then able to determine whether or not the child can relocate.

Neither party bears an onus to establish a proposed change or continuation of the existing arrangement, and a parent's right to freedom of movement must defer to the child's best interests.

The Court may also consider the following matters when determining relocation cases.

- Was there an equal time arrangement or a significant and substantial time arrangement in place prior to the proposed relocation?
- Is there a "fragile or tenuous" attachment to the non-relocating parent?
- Is the relocating parent "idealistic" in relation to what might be gained from relocating, and do they have the resources or ability to "turn the vision into a reality?"
- Does the relocating parent have established support in the proposed new location?
- Does the relocating parent have mental health or substance abuse issues?
- Is the relocating parent realistically able to fund the planned contact visits with the non-relocating parent, as proposed?
- Has the relocating parent been supportive of the relationship between the child and other parent in the past?
- Is there a history of extensive conflict between the parents?

Relocation cases are some of the most complex parenting cases determined by the Court, and it is important to bear in mind that the Court does have power to make orders not sought by either of the parties when determining such applications.

2.3.2 Wishes and Feelings of the Child

In parenting cases, a child's "best interests" are placed at the centre of decision-making, and there are two key methods by which a child's views can be brought before the Court.

- Through family or child impact reports, which are prepared by an independent third party, usually an experienced social worker or psychologist, who examines the dynamics of a co-parenting relationship and makes recommendations intended to promote the child's best interests. These independent reports will be sought in the vast majority of contested relocation cases and are a helpful piece of evidence for the Court or for the parties to consider.
- Through the appointment of an Independent Children's Lawyer (ICL), which will generally be appointed in cases involving an international relocation. The role of an ICL is to represent a child's best interests and provide a perspective that is independent of the parties in relation to parenting arrangements. Subject to some limited exceptions, ICLs are now required to meet with the child whose interests they are appointed to represent and give the child an opportunity to express any views on matters relating to the proceedings.

One of the six core considerations in relation to what is in the best interests of a child is "any views expressed by the child". Therefore, once a child's views are obtained, the Court will consider the weight to be given to such views as part of the broader inquiry as to what is in the best interests of the child. This will largely depend on the age and maturity of the child.

2.3.3 Age/Maturity of the Child

Whilst the Court does consider "any views expressed by the child", it is not bound by those views or wishes.

Although the recent amendments have removed explicit reference to a child's maturity, the Court will still consider the developmental, psychological, emotional and cultural needs of the child.

Whilst a child's views are relevant, factors such as a child's age, maturity, development and level of insight and understanding will affect how much weight a court will likely give to a child's views. For instance, a court may give significant weight to the views of a mature teenager who is consistently expressing a strong opinion about relocation. However, the views of a young child of a child who is determined to be experiencing strong influence or alignment with a particular party are unlikely to be given significant weight.

2.3.4 Importance of Keeping Children Together

The Court places a significant priority on keeping children together as far as possible and preserving sibling relationships.

The Court must have regard to the benefit of the child being able to have a relationship with other people who are significant to the child, where it is safe to do so. These relationships extend to parents, siblings and other extended family members/people of significance to that child. Although each factor has equal weighting, the Court will make parenting orders for children to live together where such arrangements are in the child's best interests.

2.3.5 Loss of Contact

Loss of contact with a left-behind parent is a consideration for the Court when determining whether a relocation is in a child's best interests. This is because the Court must have regard to the benefit of a child having a relationship with both parents, where it is safe to do so.

The recent amendments, however, have removed the focus on preserving a meaningful relationship as a primary consideration when assessing the bests interests of the child. The effect of this

change remains unknown in terms of how it will be implemented.

Some commentators have opined that the de-prioritisation of this factor (and the effect of no contact with the left-behind parent) likely means that there will be more orders in favour of relocation in cases where family violence is a significant factor.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

Each relocation case must be determined on its own facts. Generally, however, the Court does appear to be more sympathetic in relocation applications involving:

- family violence;
- limited family support or social structures, which may impact the relocating parent's mental health;
- limited employment opportunities, or financial support, for the relocating parent; and
- health issues for the relocating parent or the child, which are negatively impacted by their current residence.

The Court will tend to avoid (as far as possible) any impingement on the freedom of movement of a parent, particularly in circumstances where that parent is exposed to family violence or is the primary carer for a child.

2.3.7 Grounds for Opposition to Relocation

Although the Court is no longer required to consider (as a primary consideration) the benefit to a child in having a "meaningful relationship" with both parents, this may still be taken into account by the Court as "anything else that is relevant to the particular circumstances to the child".

The Court may therefore be sympathetic to arguments that a child's relationship with the non-applicant parent may be lost and/or significantly diminished, particularly in the following circumstances:

- if the child is very young and does not have an established relationship with the non-applicant parent;
- if neither of the parents are able to facilitate the child's travel to spend time with the non-applicant parent; or
- if there is any concern that the parent relocating will not support the child's relationship with the non-applicant parent.

2.3.8 Costs of an Application for Relocation

The likely cost of a relocation application varies depending on what issues are in dispute, how complex those issues are and what evidence is required to determine the issues.

Relocation cases are the most highly contested parenting matters, with little room for compromise. As a large proportion of such applications proceed to a final hearing, the cost of legal representation and expert evidence can be significant. If a party does not have means to fund legal representation and the case is considered to have merit, that party may qualify for publicly funded legal assistance, although the availability of such legal representation is limited to those who meet very specific criteria.

The following applies in addition to the costs of legal representation associated with the final hearing.

- Parties are also required to engage in alternative dispute resolution prior to commencing proceedings (unless exceptional circumstances exist) and generally again during the

course of litigation. The cost of private mediation alone can vary depending on the experience of the mediator. There are a number of government-subsidised mediation services and Court-funded dispute resolutions that can reduce the costs associated with this process, although they tend to have a longer waiting list.
- There are costs set by the Court associated with initiating parenting proceedings, including filing fees, daily hearing fees and setting down fees for hearings.
- The Court will generally appoint an expert to evaluate the parties' respective proposals and provide an objective analysis of the potential impact of the relocation on the child's well-being and relationships with both parents. An expert appointed by either the Court or the parties jointly will interview both of the parents and meet with the child. A report will then be prepared by the expert, setting out their observations of the child and the parents, and making recommendations to the Court. Whilst the Court does not have to accept the recommendations of the expert, the report and its recommendations are a significant piece of evidence taken into account in determining what is best for the child, including whether to allow the relocation application. The costs of a private single expert can vary depending on the experience and qualifications of the expert, the issues in dispute and how complex those issues are, and the amount of materials the expert needs to consider. If parties do not have the means to pay the costs associated with private experts, there are experts who are employed by the Court who can prepare reports at no cost to the parties, although, once again, the waiting time for these experts tends to be longer.

2.3.9 Time Taken by an Application for Relocation

Several factors may influence the length of time it takes for the Court to determine a relocation application, including:

- the availability of judicial officers;
- how long it takes for an expert report to be completed, with many private and court-based experts having significant delays in availability given the number of matters requiring reports and the limited number of experts with experience in family law matters;
- whether the parties comply with Court directions;
- whether proceedings are delayed in order to appoint legal representatives for a party if there are family violence allegations and one of the parties is unable to afford representation or does not qualify for public funding; and
- whether any interim or interlocutory judgments are subject to appeal.

Parenting matters are given some priority over financial matters, and the Court's central practice direction optimistically notes that parenting matters should be listed for a final hearing within 12 months from the date of filing the original application. However, the reality is that it often takes more than 18 months for a parenting matter to be heard, and then additional time for judgment to be delivered. If an appeal in relation to the judgment is filed within 28 days of the judgment being delivered, that can also extend the timetable for the application to be finally determined.

2.3.10 Primary Caregivers Versus Left-Behind Parents

Neither the legislation, case law nor legal principles in relocation matters expressly favour primary care givers.

However, the Court may be more sympathetic to a primary care giver who:

- has experienced family violence;
- is supportive of, and has demonstrated consistent support to, the child's relationship with the left-behind parent;
- is struggling financially, with limited (if any) financial support from the left-behind parent; and
- is experiencing mental health vulnerabilities as a result of limited family and social support, which are impacting the primary carer's parenting of the child.

2.4 Relocation Within a Jurisdiction

The same considerations apply if the proposed relocation is within the same jurisdiction. However, the Court may apply different weight to different considerations depending on the location of the proposed relocation and the distance between the child and the left-behind parent.

It is also open to the Court to consider, as an option, the left-behind parent relocating to a location closer to the child if the child is permitted to relocate. Whilst this option is available to the Court to consider in international relocation applications, it is potentially a much more practicable proposal depending on the proximity of the proposed relocation. Consideration of this option would require the Court to give the parties notice of such an option being considered by the Court, and an opportunity to respond to it.

3. Child Abduction

3.1 Legality

If a parent who holds parental responsibility for a child does not consent to the child's removal from Australia, it is an offence to remove that child from Australia if parenting proceedings have been initiated (and not determined), or if parenting orders have been made in relation to the child (unless those orders include specific travel provisions).

Failure to obtain written consent could result in a criminal conviction for the wrongful removal of a child from Australia. In such circumstances, there is a penalty of up to three years' imprisonment in Australia if a child is removed from Australia. In certain circumstances, there may also be criminal ramifications for owners or captains of vessels removing a child from Australia. It is also a criminal offence to retain a child outside of Australia for longer than consented to by the other parent or ordered by the Court.

An exception exists where a person removes a child from Australia (or retains a child outside of Australia) to prevent family violence and the conduct is reasonable in the circumstances as perceived by the person who removed the child.

3.2 Steps Taken to Return Abducted Children

The following steps can be taken if a child has been removed from Australia or retained in another country outside of Australia without a parent's consent.

- The left-behind parent can seek an order from the Court for sole decision-making in relation to the child, and for the child to be returned to Australia. Such an order would only assist if the child was to return to Australia, or if the country to which the child was taken would enforce the Australian court order through some type of registration process. It is unlikely that an Australian court order would be enforced by an overseas jurisdiction.

- An application can be made under the Hague Convention.

The Hague Convention is an agreement to protect children from international abduction and arrange the prompt return of children who are wrongfully removed from their home country. Australia is a party to the Hague Convention and has ratified its obligations under the Convention through the Family Law (Child Abduction Convention) Regulations 1986 (Cth).

If a child has been removed from Australia to another country that is a party to the Hague Convention (without consent or a Court order permitting the removal), the following steps can be taken to return the child to Australia.

- An application for the return of the child to Australia can be made by the Central Authority in Australia to the Central Authority of the Hague Convention country where the child has been taken.
- The applicant must establish that:
  (a) they are an eligible applicant (if a child is wrongly removed from Australia or retained in a Convention country, only the responsible authority may apply);
  (b) there is a relevant child under the age of 16 years; and
  (c) the child has been either wrongly removed or retained in a country that is a party to the Hague Convention.

The Court in the jurisdiction where the child has been removed to and/or retained is required to order the return of a child to Australia if:

- an application is made for a child to be returned;
- the application is filed within one year of the child being removed from or retained in another country; and
- the court is satisfied that the child's removal or retention was wrongful.

The Court considers the following criteria in determining whether the child's removal or retention was wrongful:

- the child is under 16 years;
- immediately prior to their removal, the child was habitually resident in the country from which they were removed;
- immediately prior to the removal or retention, the parent seeking the return of their child had rights of custody in relation to that child;
- the wrongful removal or retention of the child breached that parent's rights of custody; and
- at the time of the removal or retention, the parent seeking the return of their child was exercising those rights of custody or would have exercised those rights had the child not been removed or retained.

If the Court is satisfied all of the above criteria are met, it is required to order the return of the child.

If the parent who has taken the child can satisfy the Court that they meet one of the following exceptions, then the Court may determine that, whilst the above criteria are met, the child does not have to return to the country they came from.

- If the child were returned, there would be a grave risk that the child would be exposed to physical or psychological harm or be placed in an intolerable situation.
- The parent seeking the return consented to the removal or retention, or subsequently acquiesced to the removal or retention.

- The child objects to returning to the previous country and the Court considers it appropriate to take into account those views due to the child's age and level of maturity.
- The parent seeking the return:
  (a) was not actually exercising rights of custody when the child was removed or retained; and
  (b) those rights of custody would not have been exercised by that parent if the child had remained in the country.
- It would otherwise not be permitted by the principles of fundamental freedoms or for the protection of human rights.

If a return order is made, this is not determinative of where the child will continue to live for the foreseeable future. The purpose of the Hague Convention is to return a child who has been wrongfully removed or retained to the country where it is most appropriate for their family law parenting matters to be determined.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

Australia is a signatory to the Hague Convention and has ratified its obligations under the Convention through the Family Law (Child Abduction Convention) Regulations 1986 (Cth) ("Family Law Regulations").

Access to Free Legal Advice

Free legal advice in relation to the abduction of a child is available by contacting the International Social Service (ISS) Australia. ISS is a not-for-profit charity that provides a range of free legal services to those affected by international child abduction. The relevant services include:

- free legal assistance with the preparation and submission of a return application or access to a child under the Hague Convention;
- free legal advice to overseas applicant parents during mediation;
- advising and representing parents whose return application has been filed in court in Australia in any mediation regarding that application; and
- counselling and social support services, including advice, information and referral to other services.

Legal aid is also available in each state or territory to provide free advice in relation to international abduction matters, including assisting with applications brought for the return of the child to another Convention country, provided the parent meets the relevant means, merit and forum tests.

The Central Authority in Australia can also provide limited advice without cost. However, while the interests of a parent of an abducted child and the Central Authority are often the same, the Central Authority does not act on the instructions of the parent and can provide only limited advice to that parent.

The Central Authority can also provide financial assistance. Applications can be made to cover the overseas legal costs of obtaining a court order for the return of a child and flights to return a child to Australia (as well as flights for those who are required to attend proceedings overseas). These grants do not cover the costs to access a child, nor any Australian legal costs. Eligibility requirements mean funding will generally be limited to those experiencing financial difficulties, who have reasonable prospects of the child being returned, and who are not otherwise eligible for legal assistance.

As of 1 January 2024, the International Child Abduction Respondents Scheme (ICARS) may

also provide funding to a parent who is responding to an application seeking the return of an abducted child made in an Australian court. The parent must be named as the respondent and is subject to certain eligibility requirements. Funding covers the reasonable costs of an Australian lawyer as well as disbursements, including the costs associated with obtaining an expert report or any court fees that may be incurred.

The Number of Hague Convention Cases

The Attorney General's Department Annual Report for 2022/2023 indicates that the Department dealt with 159 international family law matters (compared to 101 in 2021/2022). The outcome of these matters is not recorded.

Application of the Hague Convention

Australia rigorously applies the underlying principle of the Hague Convention for the immediate return of the child to its habitual residence. However, in doing so, the Court does carefully consider and balance the totality of the evidence, including in relation to any defences to the Convention.

Australia is bound to give effect to the Hague Convention insofar as it has been endorsed by the Regulations, limiting, to some extent, judicial discretion. This is reflected under the Regulations, which provide that the Court is also required to expedite the determination of any Hague Application, ensuring the immediate return of the child. Accordingly, matters involving the Hague Convention are expedited by the Court.

Returning a Child to a Non-Convention Country

If the child is in Australia and a parent seeks an order for a child to be returned to a non-Hague Convention country, the parent seeking the return of the child would need to file an application in the Court following the principles set out in **2.3 Application to a State Authority for Permission to Relocate a Child**. In making such an application, the parent could seek that the application be dealt with urgently.

Although not bound by the principles of the Hague Convention, the Court must always consider the best interests of the child, and may consider the policy behind the Hague Convention in reaching a decision. Evidence of a foreign parenting order conferring parental responsibility on the parent seeking return of the child may be given weight, particularly where it is a recent order, as may evidence of communication between the parties prior to, and after, the removal of the child. Other relevant evidence includes:

- source documents from the non-Hague Convention country (including school reports and medical records); and
- expert evidence of the laws in the non-Hague Convention country, in respect of family and criminal law.

If the Court makes an order to return a child to a non-Hague Convention country, the Court may request the Australian Federal Police to assist with the return of the child.

There may be difficulty enforcing any Australian parenting order in the non-Hague Convention country unless said country is a signatory to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (the "Hague Child Protection Convention"), which requires member states to recognise and enforce parenting orders made in other member states. Aus-

tralia ratified the treaty in 2003 and implemented it through the 2003 Child Protection Convention Regulations.

If a parent with orders made in a Convention country intends to travel to Australia and wants those orders to be binding in Australia, they can provide the order to the Central Authority in their home jurisdiction, which will then transmit it to the Australian Central Authority. The Australian Central Authority will then arrange for the order to be issued by the Family Court of Australia as a foreign-registered measure. Once the overseas orders are registered, they will be enforceable in Australia.

Similarly, the Child Protection Convention may assist in circumstances where both countries are signatories to the Child Protection Convention but one country is not a party to the Hague Convention. In such circumstances, orders made in Australia could be registered in the non-Hague Convention country. Once registered, the order may be enforceable in that country.

Costs and Average Timescale for Hague Applications

An application under the Hague Convention is typically made by the Central Authority on behalf of the left-behind parent. Such application is without legal cost to the left-behind parent, who may also seek funding from the ISS to assist with an application.

In contrast, there are several grants available to a parent responding to or defending an application under the Hague Convention in Australia. Grants include legal aid in the relevant state, ICARS and the ISS. See **Access to Free Legal Advice**, above, for more information.

Time

A Hague Application may be conducted on the papers, meaning the Court can make orders without any oral submissions or cross-examination. While the Court is required to expedite the determination of a Hague Application, an application on the papers is more efficient. Other variables influencing timescale include:

- whether the location of the child is known;
- whether the application is heard on an ex parte basis;
- the conduct of the respondent; and
- the number of defences and types of disputes raised.

3.4 Non-Hague Convention Countries

This is not applicable, as Australia is a Hague Convention country.

BELGIUM

Law and Practice

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Sosson Pfeiff is a law firm based in Brussels, comprising three partners and a team of six associates, all specialising in family law and international family law. Each of the partners holds esteemed positions at universities, bringing with them a deep understanding of the law and its mechanisms. Renowned for delivering tailored legal advice and solutions to clients in both domestic and international cases, Sosson Pfeiff relies on extensive experience and strong linguistic skills, with no fewer than five languages spoken among team members. Recognising the deeply personal and often emotionally challenging nature of family law matters, the firm is committed to delivering excellent client care and high-quality services. It focuses on the human aspects of each case, favouring negotiation when possible to navigate all sorts of family law challenges.

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SOSSON PFEIFF

AVOCATS SPÉCIALISÉS
EN DROIT DE LA FAMILLE

1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

Parental responsibility (*Autorité parentale*) in Belgium is a set of rights and responsibilities held by the parents, who are legally recognised as such, over a child, with the primary objective of ensuring their best interest, their well-being and their development. It is typically exercised jointly by both parents.

The concept of "parental responsibility" is detailed in Articles 371 to 387ter of the Belgium Civil Code. While the Belgium Civil Code does not give a definition, it stipulates that children and their parents owe each other respect at all ages (Article 371) and that the child is under the authority of their mother and father until they reach the age of 18 or until their emancipation (Article 372).

It is widely accepted that parental responsibility includes the ability for parents to make decisions regarding various aspects of the child's life, always in the child's best interests (caring, supervising, living arrangements, education, healthcare, spiritual guidance, etc). It also includes administrating the child's properties and assets.

1.2 Requirements for Birth Mothers

In Belgium, the birth mother automatically obtains parental responsibility over her child, as giving birth establishes a legal parental link (*filiation*), which in turn grants parental responsibility.

Article 312, Section 1 of the Belgium Civil Code is clear that the individual identified as the mother on the birth certificate is legally recognised as such. Therefore, the mother obtains parental responsibility by simply being registered as the mother on the birth certificate.

1.3 Requirements for Fathers

Parental responsibility is granted to the parents who are legally recognised as such. Therefore, a father must first be legally recognised as the child's father before he can obtain parental responsibility. There are two distinct situations to consider.

Married Fathers

According to Article 315 of the Belgian Civil Code, if a child is born during a marriage to the mother (or within 300 days after its dissolution), the mother's husband is presumed to be the father of the child. This legal presumption of paternity holds unless the mother remarries within the 300-day period, in which case the new husband is considered the father (Article 317 of the Belgian Civil Code).

This presumption can be deactivated, for example, when the child is born more than 300 days after the parents have separated and the parents are registered as living in separate residences.

Unmarried Fathers

The following is relevant to unmarried fathers, including fathers in registered partnership (known as *cohabitation légale* in Belgium).

- Acknowledgement (*Reconnaissance*): if the father is not married to the mother when the child is born, the father needs to formally acknowledge the child in order to be legally recognised as the father. This acknowledgment is known as *reconnaissance de paternité*, and involves an official statement being registered with the state authority by which the father declares that he is the father. The birth mother needs to consent to it if the child

is under 18; the child needs to consent if they are over 12. The father does not need to demonstrate that he is the biological father to acknowledge the child.
- Court order: the family court can also establish a parental link – eg, if the father does not recognise the child voluntarily.

Once the father has his parental link established, he is automatically granted parental responsibility over the child.

1.4 Requirements for Non-genetic Parents

In Belgium, a person needs to be legally recognised as a parent in order to obtain parental responsibility. In situations other than those described in **1.2 Requirements for Birth Mothers** and **1.3 Requirements for Fathers**), non-biological parents may establish their parental link with the child through adoption proceedings; see **1.7 Adoption** for more detail. If the adoption is granted, the adopting parents will legally become the parents of the child, which will prompt parental responsibility.

1.5 Relevance of Marriage at Point of Conception or Birth

The marriage of the parents itself does not directly impact parental responsibility, as parental responsibility is linked to parentage link and not marital status. However, the marriage of the parents can have an indirect impact on parental responsibility. As explained in **1.2 Requirements for Birth Mothers**, the husband is automatically recognised as the father of his wife's child when the child is born during the marriage, and therefore obtains parental responsibility over the child at the same time.

1.6 Same-Sex Relationships

Parental responsibility is linked to parentage; the sexual orientation of the parents has no impact on parental responsibility. Therefore, like in heterosexual couples, individuals in a same-sex relationship need to establish their parental link in order to exercise parental responsibility.

In the application of Belgium law, it is possible for the child to have two legal mothers (co-mothers): for example, the wife of the birth mother can benefit from the legal presumption of parentage described in **1.2 Requirements for Birth Mothers**.

However, a child cannot have two legal fathers. Therefore, the husband of a father will not automatically be recognised as the co-father even if the child is born during the marriage. The second father will need to establish his parental link through adoption.

1.7 Adoption

Court Order

In Belgium, prospective adoptive parents must seek an adoption decision from the family court (*Tribunal de la famille*). Once they are recognised as (adoptive) parents, they will automatically be granted parental responsibility. However, becoming an adoptive parent involves a complex and thorough process where the court carefully checks that the adoption is indeed in the best interests of the child and if the prospective adoptive parents are fully prepared for their new responsibilities.

Full or Simple Adoption

In Belgium, there are two types of adoption: full adoption (*adoption plénière*) and simple adoption (*adoption simple*). It will be up to the prospective parents to indicate in their request whether they are applying for full or simple adoption, and it

will be up to the biological parents (when they are known) to indicate whether they consent to a simple or a full adoption. Essentially, full adoption suppresses all legal ties between the child and their biological family, whereas simple adoption maintains some links.

Both types of adoption grant adoptive parents full parental responsibility. However, in the case of simple adoption, biological parents may request the right to maintain personal relationships with the child.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

In Belgium, parental responsibility is typically shared between the parents (except in serious and exceptional circumstances when a parent can be deprived of parental responsibility by a court order). Therefore, if a parent wishes to relocate with a child, consent to this relocation is required from the other parent, provided that this second parent has parental responsibility over the child.

2.2 Relocation Without Full Consent

If the other parent (with parental responsibility) disagrees with the proposed relocation, the parent who wishes to move abroad with the child will need to seek an order from the family court (*Tribunal de la famille*) to allow the relocation.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

In Belgium, when an application for relocation is brought before the family court, the decision to allow or deny the relocation is made on a case-by-case basis. The court examines reasons for the relocation request, the conditions under which the proposed relocation would occur, and how these factors align with the child's best interests.

As a general framework, the court will consider factors across three main categories, as follows.

- The reasons for the proposed relocation and the validity of the parent's justification for wanting to move with the child. Examples include (sometimes in combination):
  - (a) professional reasons – the parent's current employer requires relocation due to business needs, or the applying parent has secured a new job in another jurisdiction with better career prospects;
  - (b) relationship – the applying parent's new partner resides in another jurisdiction or needs to move to another jurisdiction for career opportunities;
  - (c) emotional factors – the applying parent's desire to go back to their home country and family; and
  - (d) health reasons – this includes mental health, as the mental well-being of the applying parent is relevant to assess whether relocation should be allowed or denied because of its impact on the parent-child relationship and the overall welfare of the child.
- The conditions under which the relocation would occur. The court may assess:
  - (a) the professional stability of the applying parent to ensure they can adequately meet the child's needs;
  - (b) living arrangements in the new jurisdiction, ensuring they are suitable and supportive of the child's well-being;
  - (c) the proposed school, educational opportunities and any extracurricular activities

available to the child in the new location;
(d) any proposal to maintain the child's cultural background, especially if the child holds dual nationalities and if the move might result in disconnecting the child from part of their roots; and
(e) any emotional ties the child may have in the new country (friends, grandparents, siblings, etc).

- The specific needs of the child and how well they align with the relocation project, which can include the following.
  (a) Emotional continuity:
    (i) identifying the primary caregiver of the child and if the primary caregiver is also the parent applying for relocation, and seeking to establish the primary residence of the child in another jurisdiction;
    (ii) exploring the existing relationship between the parents, and between each parent and the child, to assess the likelihood of maintaining the bond upon relocation; and
    (iii) the proposed care arrangements for the child in the event of relocation – the court assesses the extent to which the proposed relocation might impact the current care arrangements and/or whether the proposed care arrangements are sufficient to maintain the bond between the child and the parent who could be left behind.
  (b) Disruption to daily life/stability needs – the disruption that the relocation would have on a child's life and the ability of the child to adapt to new environments, taking into account factors such as their age, wishes and feelings, their familiarity with international settings or frequent moves, existing bonds and stability needs.
  (c) Potential agreements between the parents, such as prior plans to establish residence in a specific jurisdiction and how these agreements align with the relocation application.

2.3.2 Wishes and Feelings of the Child

Under Belgian law, specifically Article 1004/1 of the *Code Judiciaire*, children have the opportunity to have their voices heard in all proceedings directly concerning them, expect those that are of a solely financial nature. The objective is for children to express their concerns and wishes to help the court in the decision-making process for their welfare, which is paramount in any relocation decision.

Decision to Hear a Child Based on the Child's Age

For children aged 12 years or younger, a request for their voice to be heard can be made by parents or by the judge in relocation cases. However, the judge can decide not to hear a child under 12 based on a reasoned decision, unless the request to be heard has been made by the child themselves. For example, it has been ruled that a judge might decline to hear a child under 12 if that child is caught in parental conflict and if an expert has already been appointed to assess the child's needs and psychological state.

Children aged 12 or older are informed by the judge of their right to have their voice heard. If a request is made, the judge cannot refuse to hear the child.

Assessment by the Court of the Child's Wishes and Feelings

While the judge will take the child's wishes and feelings into account to rule on relocation, the judge is not bound to follow them. The decision to follow the child's wishes and feelings or not

depends on factors such as the child's age, the child's maturity, other circumstances such as the involvement of the child in any parental disputes, and even the manner and enthusiasm with which the child expresses themselves during their conversation with the judge.

The maturity of the child is assessed, taking into account both their age and their individual development. This assessment includes, for example, the ability of the child to understand the overall situation and to articulate opinions, and the emotional stability of the child. These factors collectively help the judge to assess the importance of the child's expressed views when making a decision in the case.

2.3.3 Age/Maturity of the Child

Further to the situation outlined in **2.3.2 Wishes and Feelings of the Child**, generally, the younger the child is, the lower their maturity is considered to be, and the judge exercises greater caution in weighing their views.

Independently of the child's age, and since maturity levels vary from one child to another, the judge evaluates the individual child's maturity to determine the significance of their views in the decision-making process for relocation.

2.3.4 Importance of Keeping Children Together

Article 374, Section 2 of the Belgium Civil Code states that when parents have several children, the court should aim to apply the same regime for all children, and specifies how they will maintain personal relationships with each other. Therefore, when assessing a relocation case, the judge begins with the understanding that keeping the siblings together is typically in the best interests of the child. However, the judge also examines the specific circumstances of the case, including factors such as the emotional bond between siblings, their historical interactions and the age gap between them, rather than basing the decision solely on this consideration.

In summary, maintaining the unity of the siblings is of paramount importance and can significantly influence the decision to approve or deny relocation, but the judge will still assess the specific circumstances of the case.

2.3.5 Loss of Contact

Ensuring the continuity of the parent-child relationship with the parent left behind is a paramount concern for Belgian courts in a relocation application. Applications for relocation that lack proposals on maintaining this bond with the left-behind parent are generally frowned upon. There is a widespread acceptance that maintaining significant and ongoing relationships with both parents is in the best interests of the child, unless the evidence of the case shows otherwise.

In Belgium, applications for relocation are very often brought to the court by the parent who is already the primary carer for the child and with whom the child primarily resides. In such cases, there may be opportunities to maintain existing care arrangements to some extent, which the judge views favourably. Proposals that facilitate the relationship and rights of the left-behind parent with the child are very much valued when evaluating the relocation request. This may include a proposal to cover the transportation costs of the left-behind parent, for example, or arranging accommodation to facilitate visits to the child.

On the other hand, applications for relocation that include denigrating comments about the other parent, reflect a highly contentious rela-

tionship or indicate denial of the role of the parent in the child's life may raise concerns that the relocation could lead to parental alienation, potentially prompting the judge to deny the relocation.

The judge will also scrutinise any pre-existing agreements or conventions between the parents on care arrangements for the child.

In summary, to reach a decision on relocation, the court will carefully assess whether the proposed relocation plan respects the rights of both parents to maintain a close relationship with the child, as well as any existing agreements or conventions in place between the parents.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

The judge will always conduct a case-by-case assessment, and strongly disapproves of motives for relocation that appear purely selfish and are not thoroughly thought out, lack consideration for the child's interests or aim to punish the other parent.

The primary reasons brought forward by parents wishing to relocate with the child and generally viewed favourably by the Belgian judge, when well grounded and explained, include the following (see **2.3.1 Factors Determining an Application for Relocation** for more information).

- Professional reasons:
  - (a) the parent's job necessitates relocation; or
  - (b) the relocation opens new professional opportunities.
- Emotional reasons:
  - (a) relocating to be with a new partner in a different jurisdiction, provided the relationship is established and stable (which is sometimes challenging to assess for the judge); or
  - (b) a desire to return to one's home country to be close to culture, family and friends.
- Health reasons:
  - (a) physical or mental health issues that can be better treated in the country of relocation.

None of the reasons will automatically prompt the judge to rule in favour of relocation. In the end, the judge will want to see that the relocation project has been carefully considered and planned with the child's best interests at its core.

2.3.7 Grounds for Opposition to Relocation

In opposing the relocation, the non-applicant parent can use several arguments, often in combination, that all aim to demonstrate that the relocation request does not serve the child's best interests.

In Belgium, the judge will give particular consideration to the following arguments.

- Questioning the motivations of the relocating parent, which may include:
  - (a) highlighting the weakness of the arguments presented for relocation; or
  - (b) evidencing the lack of preparedness or thorough planning of the relocation by the applying parent.
- Emphasising the disproportionate impact of the relocation decision on the child's stability, pointing out:
  - (a) the significant disruption to the child's routine and stability; or
  - (b) the risk of alienation from friends, school and familiar environments.
- Expressing concerns for the continuation of the relationship with the non-applicant parent:

(a) demonstrating their active involvement in the child's life;
(b) showing how the relocation would negatively impact the current care arrangement and diminish their role in the child's life; or
(c) potentially presenting evidence of the plan of the applying parent to alienate the child from the non-applying parent.

- Proposing alternative solutions to relocation:
  (a) presenting alternative solutions that would avoid the need for the relocation of the child while still addressing the concerns of the relocating parent.

2.3.8 Costs of an Application for Relocation

It is not easy to assess the costs of a relocation application, as they depend on the complexity of the case and whether or not appeals are involved. In Belgium, a lawyer typically charges by the hour.

2.3.9 Time Taken by an Application for Relocation

Unless the case is particularly urgent, and depending on its complexity, a relocation application will typically be decided within six months to one year.

2.3.10 Primary Caregivers Versus Left-Behind Parents

In Belgium, the court does not show a tendency to favour either the primary carer or the left-behind parent. The family court prioritises the parent who can best uphold the rights of the other parent, placing great importance on the emotional stability of the child and therefore on maintaining continuity in relationships with both parents. The family court has a very individualised and nuanced approach to relocation applications and navigates the unique circumstances of each family to reach a decision on relocation. The court's unique compass is the best interests of the child.

2.4 Relocation Within a Jurisdiction

In the context of Belgium, relocating to another part of the country with the child also requires the consent of the other parent with parental responsibility. If the other parent does not consent, an application to the court is necessary.

As in international relocation, the judge will consider how the move will impact the child's established routines, relationships and overall stability and decide on the relocation request, with the child's best interests in mind. There is no difference in the approach: it is also a case-by-case assessment and the factors taken into consideration are essentially the same.

3. Child Abduction

3.1 Legality

It is not legal for a parent to take the child out of the jurisdiction without the consent of the other parent if this other parent shares parental responsibility over the child.

3.2 Steps Taken to Return Abducted Children

When a child is abducted from Belgium, which is a member of the EU and a party to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the approach to addressing the situation depends on whether the destination country is:

- an EU country;
- a non-EU country that is part of the 1980 Hague Convention;
- a non-EU country that is part of the 1996 Hague Convention; or

- a non-Hague Convention country.

Abduction From Belgium to a Hague Convention Country

Lodging the request for immediate return

The first step that will prompt the return of a child is to for the left-behind parent to lodge their request for the child's immediate return with the central authority of the country to which the child has been abducted. To facilitate this, the Hague Convention (Article 8) outlines three options:

- contact the central authority of the child's habitual residence;
- contact the central authority of the country to which the child has been abducted; or
- contact any central authority of a contracting state.

Seeking help from the Belgium central authority: the SPF Justice

In Belgium, the applying parent typically seeks help from the Belgian central authority, which is the SPF Justice (Boulevard de Waterloo, 1115 – 1000 Brussels, +32 (0) 2 542 67 00, rapt-parent@just.fgov.be), available 24/7. The SPF will then forward the request for the immediate return to the relevant authority of the country to which the child has been abducted.

The applying parent is requested to:

- complete a power of attorney to authorise the SPF and the requested central authority to act on their behalf;
- complete, date and sign a request form; and
- provide the following documents:
  - (a) an extract of the child's birth certificate;
  - (b) any document proving the child's habitual residence was in Belgium;
  - (c) any court decision(s) concerning the child's care arrangements;
  - (d) a copy of any written agreements made by parents regarding the child's care arrangements;
  - (e) a photo of the child and, if possible, the other parent; and
  - (f) a copy of any complaint filed with the police.

When the abduction destination is unknown, the SPF Justice should assist in locating the child by contacting the other central authorities of Hague Convention contracting states.

Role of the requested central authority

Article 10 of the Hague Convention 1980 obliges the requested central authority to take all measures to facilitate the voluntary return of the child. If an amicable solution is not possible, the requested central authority will refer the case to the competent court.

It should be noted that when the requested central authority is in an EU country, the courts must specifically invite the parties to consider mediation (Article 25 of the Brussels IIter Regulation).

Once the immediate return has been requested

The courts of the requested state are then meant to order the return of the child, except in very exceptional circumstances outlined in Articles 12 and 13 of the Hague Convention 1980.

Upon a court decision ordering the immediate return of the child, the requested state must also assist in the forceful execution of this decision to ensure compliance. The European Court of Human Rights considers the failure to enforce such a decision to be a breach of Article 8, which protects the right to privacy and family life (Shaw v Hungary).

EU country
If the country to which the child has been abducted is also an EU country (save for Denmark), the Brussels II ter Regulation will apply in addition to the 1980 Hague Convention.

Abduction From Belgium to a Non-Hague Convention Country
If the state where the child has been abducted to is not a party to the 1980 Hague Convention, the left-behind parent (preferably with the assistance of a legal adviser) will need to investigate whether other multilateral or bilateral agreements exist that address the issue of child abduction.

If the country to which the child has been abducted is a party to the 1996 Hague Convention, then this Convention applies.

Regarding bilateral agreements, Belgium has signed an agreement with Tunisia, for example, that specifically addresses child abduction.

If there is no specific agreement in place, the left-behind parent will have no other option but to rely on other multilateral agreements that may indirectly address child abduction (eg, the 1989 Convention on the Rights of the Child), criminal law provisions and/or diplomatic channels to pursue the return of the child.

3.3 Hague Convention on the Civil Aspects of International Child Abduction
As mentioned in **3.2 Steps Taken to Return Abducted Children**, Belgium is a signatory to the 1980 Hague Convention.

Cost of Legal Advice
In Belgium, the left-behind parent can apply using the central authority (SPF Justice). In this case, the SPF itself lodges the application for the return of the child, and the application is signed by the Public prosecutor. If there is a conflict of interest between the public prosecutor and the left-behind parent, the central authority will mandate a lawyer, but the left-behind parent will have nothing to pay: the state will cover the costs.

The parent can also choose to apply directly to the court for the immediate return of the child. In this case, they will probably want to use a lawyer, who generally charges by the hour in Belgium.

For data provided by the SPF about the number of Hague Convention cases in Belgium by year and their outcomes, please visit www.justice.belgium.be.

Court Sympathies
Belgian family courts rigorously apply the underlying principle of the Hague Convention, which is to order the return of the child, without looking at the merits of the case but will of course thoroughly assess the legitimacy of any defences brought to oppose the return. To expedite proceedings and meet the requirement for prompt resolution, Belgian law specifies that only six specialised courts (presidents from the courts of first instance in Brussels, Liège, Mons, Ghent, Antwerp and Eupen for proceedings in German) can decide on 1980 Hague Convention abduction cases, to ensure efficiency in dealing with such matters.

Applying for the Return of a Child From a Non-Convention Country
If the country to which the child has been abducted is not a party to the 1980 Hague Convention, the left-behind parent will need to bring an application to the family court for the return of the child. In this case, the court will conduct a regular application “on merits” where, instead of ordering the immediate return of the child, it

will assess the best interests of the child to reach a decision.

Costs and Timescales for Applications

Unless the application for return is brought through the central authority (SPF) under the conditions described above (in which case the costs are covered by the state), the left-behind parent will generally want to hire a lawyer, who charges by the hour. The total costs will depend entirely on the duration and complexity of the case, including factors such as the presentation of defences or the lodging of appeals.

For a standard case where the immediate return of the child is ordered, proceedings typically last around a month on average.

3.4 Non-Hague Convention Countries

This is not applicable, as Belgium is a Hague Convention Country.

BRAZIL

Law and Practice

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Chieco Advogados is a boutique law firm based in São Paulo, which also has a presence in Zurich. Established ten years ago, the firm focuses on Brazilian family and succession law, having expertise in multi-jurisdictional cases and disputes involving family and succession matters, such as divorce and custody and relocation, and including abduction cases under the 1980 Hague Convention. Within its sophisticated worldwide private clients practice, the full range of family and succession matters are covered, such as estate and succession planning, guardianship, alimony and child support, paternity investigations, and probate procedures. The firm provides advice to high net worth individuals and family entrepreneurs, guiding the clients in crucial choices to support their family members, preserve their assets and plan their succession. In litigation, the firm acts before the courts in the best interests of the client, without losing sight of the family bonds to be maintained. Advice is also provided on the tax consequences surrounding family and succession matters. Chieco Advogados contributes to the International Committee of the Red Cross in Brazil by providing pro bono legal advice.

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

Parental responsibilities are part of what the Brazilian Civil Code calls "parental authority", a set of duties and rights that both parents have over their minor children (under 18 years old).

Both parents exercise this authority, regardless of the status of the parents' relationship, and it arises from both natural parenthood and legal or socio-affective parenthood. Parental authority is non-renounceable and non-transferable, even if the minor is under the temporary responsibility of a third party. It can, however, be revoked by the courts in extreme cases or be extinguished through emancipation (ie, parents agree to make minors aged between 16 and 18 capable of all acts of civil life).

Parents must assist, raise, educate, provide material and emotional support, as well as exercise custody. They may grant or deny consent for the children to marry, to travel abroad or to move permanently to another city/state or country.

1.2 Requirements for Birth Mothers

The Brazilian Civil Code assumes that the mother is the one who gives birth to the child. Exceptions to this presumption are cases originating from assisted reproduction techniques (surrogate pregnancies), in which the birth mother will not have parental authority.

1.3 Requirements for Fathers

As a rule, after birth, the father must acknowledge the child before the civil registry, taking with him a birth declaration (*declaração de nascido vivo* – "CNV") provided by the hospital. If the child was not born in a hospital, the parents must go to a registry office with two witnesses over the age of 18 who can confirm the pregnancy and birth. In this case, the birth declaration is issued by the registry office or by the health department of the city or state.

In Brazil, paternity is presumed during marriage or a "stable union" (a constitutionally recognised common-law union) in the following situations:

- children born 180 days after the start of marital/stable union cohabitation; and
- children born within 300 days of the dissolution of the marriage (or stable union).

Other cases of presumption relate to assisted reproduction techniques, such as children born through homologous artificial insemination, that is, where genetic material from both parents is used (surrogate births), or heterologous artificial insemination, where some of the genetic material used is donated by a third party through legalised clinics and where the other parent has authorised the procedure.

Parental rights arising from assisted reproduction techniques are not yet reflected in federal law, but are widely enforced by the courts and are the subject of Resolution 149/2023 from the National Council of Justice ("CNJ") and Resolution 2.320/2022 from the Federal Council of Medicine ("CFM"). Furthermore, a preliminary draft of a new Civil Code, which includes provisions on these rights, was recently submitted to the National Congress. As a result, it is possible that federal law on this matter will be enacted within a few years.

1.4 Requirements for Non-genetic Parents

There are three possibilities for non-biological parentage:

- adoption (see **1.7 Adoption**);
- assisted reproduction techniques with genetic materials donated from a third party; and
- socio-affective parentage.

In the case of assisted reproduction parentage, although the genetic material comes from a third party, Resolution 149/2023 of the CNJ and Resolution 2.320/2022 of the CFM allow the registration of these children by the receivers of the donated genetic material, and not by the donor.

Socio-affective parenting allows parents and children to declare each other as family through affection. This possibility was admitted by a Federal Supreme Court ruling (RE 898.060/SC) from 2016 and has been widely applied ever since. It is often seen in cases of children raised by stepfathers or stepmothers. The recognition of filiation can be made at a notary's office or by means of a lawsuit, depending on the circumstances.

1.5 Relevance of Marriage at Point of Conception or Birth

As mentioned in **1.3 Requirements for Fathers**, there is a presumption of parenthood for children born during the marriage. This presumption is relative and can be challenged, and DNA testing might be used if necessary.

Parents do not, however, need to be married to register their child. The parents' declaration to a notary public is the only document necessary. If there is no declaration signed by the father, the mother can register the child only with her name and the father can register the paternity at any time, spontaneously or in compliance with a judicial decision.

1.6 Same-Sex Relationships

There is no difference when it comes to parenting for same-sex couples, who can exercise custody or establish cohabitation with their children just like heterosexual couples.

1.7 Adoption

Adoption is regulated by two statutes: the Child and Adolescent Statute (CAS) and the Adoption Law (Law No 13.509/2017).

Adoption is a parental-child bond created by choice, and not by biological ties. In Brazil, it is possible to adopt children, adolescents and adults.

Adoption is an exceptional measure that should only take place when it is impossible to keep the child or adolescent with the natural family (ie, the parents) or with the so-called extended family, who are close relatives.

The adopter must be over 18 and at least 16 years older than the child or adolescent they want to adopt, have family and financial stability, as well as no criminal record, and must be prepared to undergo a social and psychological assessment. The full proceeding includes a thorough family analysis. Also, there may be a waiting list for newborns and young toddlers.

Adoption is available for couples, regardless of sexual orientation (bilateral adoption), or for individuals. It is also possible for a stepfather or stepmother to adopt their stepchild in a so-called unilateral adoption.

Once the adoption proceeding is finalised, the legal and familial ties between the child and their biological family (one parent in the unilateral adoption and both parents in the common adoption) are permanently severed.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

In the context of joint parental authority, both parents must consent to the child's international relocation. In the event of a disagreement, the court of the child's habitual residence will issue a ruling, determining the matter based on the best interests of the child.

2.2 Relocation Without Full Consent

If the other parent opposes the relocation, the parent seeking to move with the child must submit the matter to the family court. The family judge will then decide based on the best interests of the child.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

The child's best interests are the primary consideration for the judge. Factors such as the child's age, their relationship with each parent as a caregiver, extended family support in the new country, improved educational opportunities, and the potential for a higher standard of living will be evaluated.

It is expected that the application to the family court will present:

- clear and concrete reasons for moving;
- a plan of how the child's life and routine would be in the new country, including place of residence, school etc; and
- a plan of how to maintain contact with the left-behind parent, considering not only scheduling time together, but also the cost of travelling.

2.3.2 Wishes and Feelings of the Child

In these types of lawsuits, the judge rarely directly hears the children. Instead, children are usually interviewed by a court-appointed psychologist and, occasionally, by a court-appointed social worker. These experts also interview the parents and, depending on the case, other relatives. They then present their findings in a report to the judge, which is not binding, but tends to be considered. Parties can challenge the report and ask for clarification.

Children may express their wishes at these interviews, but these will be considered within the full context of the case.

2.3.3 Age/Maturity of the Child

The feelings and wishes of the child are heard and considered within the full context of the case. This also applies to older children, who may lack the maturity to make decisions about the future despite their age. It is also common for a child's expressed desires to be influenced by one parent's behaviour. Acts of parental alienation, such as derogatory remarks about the other parent or their country and family, and promises of immediate, superficial rewards in the new country, are the approaches most frequently used to interfere in a child's expressed desires.

2.3.4 Importance of Keeping Children Together

The child's emotional bonds with other relatives are a significant factor in the court's decision. Generally, the court aims to keep siblings together.

2.3.5 Loss of Contact

The judge must evaluate the ability of the parent who wishes to relocate to accommodate the other parent's location and facilitate ongoing contact between the child and the other parent.

It may be possible to grant more extensive visitation and accommodation rights, such as during the entire duration of certain school holidays, to maximise the other parent's time with the child despite the move. Additionally, video calls are commonly utilised to maintain the parent-child relationship. The parent who is moving must also consider bearing the cost of the child's trips to the original country to allow contact.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

Relocation cases are assessed individually based on their specific circumstances. Generally, the judge considers the relevance and concreteness of the reasons for relocation (eg, currently existing professional opportunities with certainty of income, health needs that require treatment unavailable in the current country, etc). Courts tend to avoid allowing the child to move if the reasons are too generic or on a trial basis.

2.3.7 Grounds for Opposition to Relocation

There are many reasons that can justify opposing a relocation request, such as:

- if the relocation is not in the child's best interests;
- if the purpose of the relocation is to sever contact with the non-relocating parent;
- if the child has never lived with the relocating parent;
- if no stable plan for the child's care has been presented to the court;
- if no concrete reason was given for the relocation;
- a lack of familial support in the new country;
- the child's inability to speak the language of the new country; and
- the fact that neither the relocating parent nor the child is a national of the new country.

The child's opposition to the move, depending on their age and the full context, can also be a factor.

2.3.8 Costs of an Application for Relocation

If the relocation is contentious the costs will be as follows.

- The court fees, which are typically low for this type of lawsuit, as it does not involve economic interests.
- The fees for retaining forensic technical assistants, such as private psychologists and social workers, or any other specialist involved in the specific case, who follow the court experts' work, discuss the techniques and methodologies applied by them to the case and present their own reports (having technical assistants is not mandatory, but is highly advisable).
- Private forensic psychologists and social workers (or any other specialist) appointed by the judge where experts are not available at the local court. Their fees are paid by the party who requested the evidence, or they are divided between the parties, if so determined by the judge. At the end of the lawsuit, the losing party must reimburse the costs paid by the winning party, including such fees.
- Legal fees are borne by the loser in a judicial dispute. These are unrelated to retained attorneys' contractual fees and are determined by the court in favour of the attorney of the winning party.

Regarding the contractual fees to hire an attorney, these can be charged in several different ways (hourly rate, fixed amounts, success fee) and there is also the possibility to apply for free representation through different entities (government and private) where a parent lacks the financial resources to hire a private one.

2.3.9 Time Taken by an Application for Relocation

An application for relocation is made through a lawsuit before a family court. As such, it follows procedural rules and is subject to time-consuming expert examinations and to appeals. Accordingly, it is difficult to estimate the time taken by an application for relocation, because it depends not only on the case specifics but also on the local family court and state court specifics.

Except for cases involving left-behind parents who are evidently not present in the child's life (eg, who see the child only on vacations, who live in another state, etc), in which an urgent decision is more likely to be rendered, it is possible for a full lawsuit, with expert examination and appeals, to take anywhere from a few to several years.

2.3.10 Primary Caregivers Versus Left-Behind Parents

There is no legal preference in the legislation between the applications of the primary caregiver parent and the left-behind parent. The court will only prefer one parent over the other if it is clear that doing so is in the child's best interests.

2.4 Relocation Within a Jurisdiction

Relocations within the same country are most common, but the best interests of the minor remain paramount. When a change of domicile occurs within the same city, the other parent's authorisation is not required.

However, if the move is to another city or state (which may mean a very long distance due to the sheer size of Brazil), either the express consent of the other parent or judicial authorisation is necessary to prevent potential issues of parental alienation, as the relocation may impact the left-behind parent's visitation rights. Both parents, regardless of their marital status, share full parental authority, which includes the right to grant or deny consent for a permanent relocation to another city or state.

3. Child Abduction

3.1 Legality

In Brazil, it is illegal to take a child or adolescent (ie, under the age of 18) away from their habitual residence without the consent of both parents, unless there is a judicial decision that replaces the consent of the refusing parent. The Hague Convention, however, is only applicable up to the age of 16.

3.2 Steps Taken to Return Abducted Children

Brazil became a signatory member of the Hague Convention through Decree-Law No 3413 of 14 April 2000. Accordingly, the return of a child who has been removed from Brazil, or is being retained within Brazilian territory, without the consent of one of the parents, must follow the procedural rules of the Convention, provided that the other country involved is also a member.

The procedure can take place exclusively through the central authorities of both countries or, if the left-behind parent wishes and is able to retain a private attorney, directly through the filing of a lawsuit before the local federal court asking for the search, seizure and return of the child.

The role of the Brazilian central authority is exercised by the Federal Administrative Central Authority ("ACAF") and the General Coordination of Adoption and International Abduction of Children and Adolescents, part of the Ministry of Justice. The central authority receives and sends

requests for international legal co-operation for the return of children abducted by their parents or relatives.

When a request from another signatory state is received by the Brazilian central authority, they analyse the request and check whether the requirements of the conventions for international abduction are present. If they are, and the central authority is unable to contact the parent who is holding the child and to mediate the situation, the central authority will forward the request to the Federal Attorney General's Office ("AGU") to file a lawsuit pleading for the search, seizure and return of the child before the federal court.

If the country from (or to) which the child has been abducted is not a signatory member of the Hague Convention or of any bilateral treaty, the case will still be considered an international abduction, but the lawsuit in Brazil will be filed before one of the lower courts (ie, a state court, not a federal court), and will be conducted along the same lines as a custody lawsuit.

Letters rogatory may be issued to the country where the abductor parent is with the child, and the federal police may be asked to include the abductor parent's name and the child's name on Interpol's "wanted" list.

The left-behind parent may also file a lawsuit before the non-signatory country. The chances of successfully returning the child vary from country to country.

On the criminal side, abduction of children under the age of 18 is considered a crime, with a penalty of two months to two years of imprisonment. The judge may, however, waive the penalty if the child is returned safely.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

Brazil has been a signatory to the 1980 Hague Convention since 2000, when Decree No 3413 of 14 April 2000 entered into force.

The Brazilian government has its own channels for dealing with cases of international abduction. Through the government's official website it is possible to obtain information and access the official contact email address.

In Brazil, it is not mandatory for the left-behind parent to retain an attorney, since the lawsuit can be filed through the AGU, which defends the interests of the Union, ie, compliance with the obligations contracted by Brazil in the Convention. The Union also provides material assistance to ensure the return is completed. However, retaining an attorney allows almost immediate access to the judiciary and can expedite the proceeding.

Brazil currently tends to comply with the Convention, and the federal courts have specific rules for this type of lawsuit, aiming to expedite the solution and favour international co-operation (Resolution 449/2022 from the CNJ). Nonetheless, some courts may have a more flexible interpretation of the exception of Article 13 (b) of the Convention and demand some degree of evidence (eg, expert examination) on whether returning to the country of habitual residence is in the best interests of the child. In less complex situations, the return can be enforced within a few months of filing the lawsuit, especially when the abduction is recent. In more complex cases, with children that have been kept in Brazil for longer periods, a final decision may take longer, even with the court's frequent remarks recognising that time is of the essence in the proceedings.

The Federal Supreme Court is currently discussing the constitutionality of several articles of the Hague Convention, at the request of a political party (ADI 4245). The lawsuit's aim is supposedly to protect Brazilian mothers and children who flee other countries due to vulnerability and domestic violence, but if ruled with grounds, the lawsuit might allow a substantially expanded interpretation of the exceptions of Article 13 of the Convention, making it less effective. The AGU and the Federal Public Prosecutor's Office have opposed the requests and defended the constitutionality of all the articles of the Convention, with the dismissal of the claims.

Regarding costs, if a case is filed by the AGU, the procedure is free of charge for the left-behind parent, and the abducting parent can be held responsible for the costs of locating and returning the child. However, if the lawsuit is filed directly by the left-behind parent, the costs must be supported by them.

3.4 Non-Hague Convention Countries

Brazil is a signatory to the Hague Convention.

ENGLAND & WALES

Trends and Developments

Contributed by:
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Dawson Cornwell

Dawson Cornwell is a leading specialist family law firm based in London, established in 1972. It is recognised as a leader in the field, not just nationally but internationally, and combines its highly regarded expertise in all aspects of family law with an unrivalled reputation in the field of international children law. The family law team is headed by 13 partners, leading specialised financial and children departments. Many of the firm's cases are international, with the firm's lawyers having extensive experience in dealing with jurisdiction and other international issues. Clients appreciate that "they have every language under the sun covered" and are trailblazers in the field of cross-border children work, to which their unparalleled and ongoing record of reported cases is testament. The firm also has a highly regarded reputation in international surrogacy, assisted reproduction law and same-sex parenting cases.

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International Child Relocation in England and Wales: An Introduction

International mobility today is influenced by various contemporary trends, particularly the rise in multicultural families, technological advancements, migration policies and geopolitical factors, amongst others. Consequently, international relocation cases are increasingly common, with one parent seeking to permanently remove a child from the jurisdiction against the wishes of the other parent.

Simultaneously, there has been a marked shift in the court's approach to child arrangements post-separation, with the starting point being that it is in the child's best interests for the care to be shared equally, provided there are no safeguarding issues or evidence to the contrary. There is a statutory presumption that, unless the contrary is shown, the involvement of both parents in the child's life will further the child's welfare (Sections 1[2A] and 1[2B] of the Children Act 1989).

These factors have made relocation proceedings more complex, and they are now often considered the most challenging cases, given the emotions and stakes involved.

This article explores the trends and developments in international child relocation in England and Wales.

When do these cases arise?

The circumstances prompting such an application are most typically as follows:

- relationships – where a parent has remarried or is in a new relationship with a person who lives abroad or is relocating abroad;
- employment – where a parent has been offered a job in another jurisdiction;
- return to roots – where a parent who is originally from a different country, wishes to return "home"; and
- lifestyle – where a parent wants to relocate on the basis that life would be better abroad.

The law

No one can relocate a child out of the jurisdiction without prior written consent of every other person with parental responsibility or permission of the court.

If the parties cannot reach an agreement, an application would need to be made to court for permission.

Judicial approach

The judicial approach to international child relocation in England and Wales is fundamentally rooted in the welfare principle, enshrined in Section 1 of the Children Act 1989. The child's welfare is the court's paramount consideration.

The court also considers the factors set out in the welfare checklist (Section 1(3) of the Children Act 1989), which are:

- the ascertainable wishes and feelings of the child concerned (considered in light of age and understanding);
- physical, emotional and educational needs;
- the likely effect of any change in circumstances;
- age, sex, background and any characteristic the court considers relevant;
- any harm the child has suffered or is at risk of suffering;
- how capable each parent is of meeting the child's needs; and
- the range of powers available to the court.

The court must not make an order unless it considers that doing so would be better for the child than making no order at all (Section 1(5) of the Children Act 1989).

Prior to the introduction of the statutory presumption of parental involvement in 2014, it was expected to be easier for the "primary caregiver" (often the mother) to obtain permission to relocate the child. This was, in part, also due to the landmark case of Payne v Payne [2001] EWCA Civ 166, which was the leading authority for many years. In Payne, the Court of Appeal set out the following guidance to judges in determining leave to remove applications:

- the welfare of the child is always paramount;
- there is no presumption in favour of the applicant parent;
- the reasonable proposals of the parent with a "residence order" (no longer in existence) wishing to live abroad carry great weight;
- proposals have to be scrutinised with care, and the court needs to be satisfied that there is genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end;
- the effect on the applicant parent and the new family of the child of a refusal of leave is very important;
- the effect on the child of the denial of contact with the other parent and, in some cases, their family is very important; and
- the opportunity for continuing contact between the child and the parent left behind may be very significant.

The judicial approach has since evolved, with recent cases indicating a shift towards a more nuanced and balanced application of the welfare principle, reflecting a broader recognition of the complexities involved in relocation cases.

While the Payne guidelines remain somewhat influential, subsequent cases have refined the approach, emphasising a more holistic consideration of the welfare principle. The current leading cases are the Court of Appeal's decisions in K v K (Relocation: Shared Care) [2011] EWCA Civ 793, Re F (Relocation) [2012] EWCA Civ 1364 and Re F (A Child) (International Relocation) [2015] EWCA Civ 882.

- In K v K, the Court of Appeal warned against elevating the guidance in Payne to the status of rigid principles of law, highlighting the limitations of the guidelines, particularly in cases where both parents are actively involved in the child's life. The court emphasised the

importance of a comprehensive analysis of the welfare factors, rather than a formulaic application of the Payne principles. This case marked a significant step towards a more balanced and flexible approach to relocation cases, and established that applications are to be determined on welfare principles alone.

- In Re F [2012], the Court of Appeal reaffirmed the importance of the welfare principle as the paramount consideration in relocation cases, stressing that each case must be decided on its own facts and that the Payne guideline should not be applied rigidly. This case highlighted the move towards a more individualised assessment of the child's best interests.
- In Re F [2015], the Court of Appeal confirmed that Re F [2012] represented the current law in respect of any application for permanent international relocation and was the starting point. It reaffirmed that the child's welfare is the paramount consideration and marked a move from categorising cases into "primary care" or "shared care" cases. It highlighted the impact of the statutory presumption of parental involvement, which heightened the court's scrutiny of the arrangements proposed by each parent and stressed the necessity for the overall, comprehensive analysis of a child's welfare seen as a whole, having regard in particular to the circumstances set out in the welfare checklist.

Case law update

In Re K (A Child) [2020] EWHC 488 Fam, Williams J suggested a composite guidance to help the court identify relevant issues, which considered the Payne guidance, welfare checklists, holistic evaluation and proportionality evaluation.

This included the following.

- The ascertainable wishes and feelings of the child, considered in light of age and understanding.
- Physical, emotional and educational needs.
- The likely effect of change in circumstances, including:
  - (a) changes to housing, schooling and relationships if remaining in England;
  - (b) how likely it is for the plan to be implemented as proposed;
  - (c) positive effects in relation to removing a parent's ability to care for the child if the child moves abroad;
  - (d) positives and negatives about the proposed destination country in terms of environment, education and links with family;
  - (e) the impact on the child of moving permanently to another country in relation to their relationship with the left-behind parent and other extended family; and
  - (f) the extent to which this impact may be offset by ongoing contact and extension to other relationships in new country.
- The child's age, sex, background and any characteristics considered relevant.
- Any harm the child has suffered or is at risk of suffering, which overlaps with the effects of change and includes:
  - (a) the impact on the child of the change of relationship with the left-behind parent;
  - (b) how secure that relationship is and how likely it is to endure and thrive if the child moves;
  - (c) how realistic the proposals for maintaining contact are;
  - (d) the impact on the moving party of having to remain in England contrary to their wishes, and the consequent impact on the child;

(e) the impact on the left-behind parent of the child moving;
(f) whether the ability of either parent to provide care for the child will be adversely affected by the refusal or grant of the application and, if so, to what extent; and
(g) the extent to which loss of contact with the left-behind family will be made up for by the extension of contact with the family in the new country.

- The capability of the parents to meet the child's needs, including:
  (a) how the parents are currently meeting the child's needs;
  (b) whether there are any aspects of their ability that may be important in the context of a relocation – for instance, their capability of meeting the emotional needs of the child for a relationship with the left-behind parent;
  (c) whether the relocation application is wholly or partially motivated by a desire to exclude or limit the left-behind parent's role;
  (d) whether the left-behind parent's opposition to the move is genuine or motivated by a desire to control, or by another malign motive;
  (e) whether the parent would be better able to care for the child in the new country than in England; and
  (f) the role that the left-behind parent can play in the future.
- The range of powers available to the court under the Children Act 1989, including:
  (a) whether conditions of contact can be imposed in terms of the provision of funds or the frequency of visits; and
  (b) whether court orders can be made in the other country – either mirror orders or orders that will allow reciprocal enforcement.

Approach where a parent had previously removed a child without consent

In Re Z (Relocation) [2012] EWHC 139, a mother was granted permission to relocate to Australia. The father had previously wrongfully retained the child in Belgium for 11 months. The Judge found that the father's wrongful retention had been emotionally devastating for the mother, and this was a persuasive factor in deciding the application in her favour.

Conversely, in Re X, Y and Z (Children) (Retrospective Leave to Remove from the Jurisdiction) [2016] EWHC 2439 (Fam), the High Court gave retrospective permission to a mother to temporarily remove the children to Spain, despite a return order being made in 1980 Hague proceedings. The court held that it would not be in the children's best interests to stay the mother's application and permit the enforcement (ordered in Spain following several unsuccessful enforcement attempts).

It is far better to seek leave to remove than to remove a child without consent and be subject to a return order following 1980 Hague proceedings. A parent who "takes the law into their own hands" and wrongfully removes and retains a child jeopardises a relocation application as it puts into question the motivations for such an application and whether the parent wishing to relocate can be trusted to maintain, promote and facilitate a relationship with the left-behind parent.

Approach where there are numerous children

Each child's welfare and interests should be considered separately and individually (Re S (Relocation: Interest of Siblings) [2011] EWCA Civ 545). This means that there may be different outcomes for different children, with the relocation of one being permitted, and not of the other.

Approach where older children are involved (16+)

The court has been reluctant to make orders for older children, considering it "inappropriate and even futile" to make orders that conflict with the wishes of older children (Re C (Older Children: Relocation) [2015] EWCA Civ 1298).

The wishes and feelings element of the welfare checklist is given significantly more weight when it comes to older children.

The court also weights the "No Order Principle" (Section 1(5) of the Children Act 1989) heavily when a matter concerns older children, questioning whether the making of any order can be justified in the circumstances.

However, the courts do intervene and can make a decision contrary to an older child's express wishes and feelings when relocation is not considered to be in the child's best interests (Re N-A (Children) [2017] EWCA Civ 230).

Approach where domestic abuse is an element

The court presumes that parental involvement in a child's life will further the child's welfare. As society becomes more educated and aware of domestic abuse and the impact it has on children and parents, this presumption is questioned. Since 2017, the court has had a responsibility to consider whether domestic abuse is an issue in each individual case and whether a fact-finding hearing is necessary through Practice Direction 12 J.

The increased awareness of domestic abuse and the court's approach to domestic abuse have also had an impact on international relocation cases. Practitioners used to strongly advise against making allegations of abuse when a parent wanted to relocate. This was because there was a risk that the application would not succeed by linking the motives to a desire to remove the other parent from the children's lives.

The common practice used to be a concentration on the positives of the relationship between the non-relocating parents to propose a generous and workable plan for contact between children and the non-relocating parent that would not be weakened by the physical distance between them.

This practice of hiding the abuse in the relationship to strengthen the application for relocation is finally fading. There are more cases in which the disclosure of abuse has resulted in a fact-finding hearing and limited, supervised contact between the children and the non-relocating parent. A wish to relocate because of the abuse that you might have been subjected to in your personal relationship is no longer an impediment. This reinforces the position that the court's approach in these cases will be to consider the child's welfare.

Unfortunately, there is no leading authority on this issue and many practitioners continue to minimise the abuse or advise against its disclosure, believing it will jeopardise the chances of succeeding with relocation.

Where are we now?

At present, the welfare of the child is the paramount consideration, with each case being decided on its own facts following a child-focused, global, holistic analysis of the proposals (and counterproposals) and the impact of a decision on the child.

The proper approach is for the court to have available to it all the options proposed by the parents as the appropriate outcome, having

regard to the child's paramount welfare. Each parent's proposals are carefully scrutinised and weighed up, alongside the welfare checklist, in a comparative evaluation. The key headlines can be summarised as follows.

- There is a need for a holistic examination of all the competing options (as reaffirmed in Re M (A Child) [2017] EWCA Civ 2356 and Re C (A Child) [2019] EWHC 131 (Fam)).
- The court must not determine the best arrangements for the child before determining an application for relocation. The pros and cons of each realistic option must be considered. The analysis must not be compartmentalised (L v F (Relocation: Second Appeal) [2017] EWCA Civ 2121).
- The same principles apply regardless of the motivations for the application, although a proposed relocation to a familiar environment (ie, return to home) sets a lower bar than a relocation to a new country (ie, lifestyle) (Re F and H (Children) [2007] EWCA Civ 692).
- The courts are alive to the right of the child to have a meaningful relationship with the active involvement of both parents in their upbringing, considering the presumption of parental involvement.
- Scrutiny of the motivation and genuineness of the application is necessary.
- An evaluation of the proportionality may be necessary, given the gravity of the impact on the relationship between the child and the non-relocating parent and the subsequent interference in the Article 8 ECHR rights of the parents.

Recent cases have shown an increased focus on the following.

- Child's voice – recent cases have placed a greater emphasis on the child's voice (subject to age) in relocation proceedings. This aligns with the principles of the United Nations Convention on the Rights of the Child, which emphasises the right of the child to express their views freely in matters affecting them.
- Technological advancements – the rise of technology has significantly impacted the landscape of international child relocation, with the availability of video calls making it easier for children to maintain meaningful relationships with the non-relocating parents. While this does not replace direct face-to-face contact, courts are increasingly inclined to consider virtual contact arrangements as a means of preserving the child's relationship with the non-relocating parent.
- Global mobility and international treaties – courts are mindful of the potential for international abduction and the need to ensure that relocation orders are enforceable in the destination country. There is a more cautious and thorough examination of relocation proposals, including the necessity to consider the possibility of reciprocal enforcement or mirror orders being in place as a safeguard.
- Psychology and developmental considerations – there is a growing recognition of the psychological and developmental impact of relocation on children. This was brought into focus following a research paper (Relocation: the Reunite research, 2009) that looked into the impact on children as a result of the loss of a relationship with the left-behind parent. Courts are more attuned to the potential emotional and psychological effects of separation from a parent and the importance of stability and continuing in the child's life. This awareness has contributed to a more child-centred approach in relocation cases.
- Domestic abuse and international relocation – applications to relocate when there have been findings of domestic abuse are succeeding.

Allegations of abuse did not used to be disclosed, on the assumption that good parental communication and relationship would be needed to succeed in relocating. This is no longer the practice and we are in need of a leading authority in this aspect.

Where next?

Following the International Judicial Conference on Cross-Border Family Relocation in Washington, DC (part of the Hague Conference on Private International Law) in March 2010, the Washington Declaration on International Family Relocation was made, which provided that there should be no presumption either way in international relocation cases, which should be decided on welfare principles.

In 2015, the Council of Europe published Recommendation CM/Rec (2015) 4 adopted by the Committee of Ministers on preventing and resolving disputes in child relocation. The document mirrored the principles and conclusions of the Washington Declaration.

The issue of international relocation was added to the agenda in the 8th Special Commission on the Hague Convention 1980 and Hague Convention 1996. One of the authors was invited to present a comparative study that highlighted the lack of provisions in domestic legislation for international relocation, the length of those proceedings, the lack of consistency on the principles applied and the lack of knowledge of the Washington Declaration 2010. It was added to the conclusions that the Hague Conference would send a questionnaire to Signatory Members on relocation for continued work on the issue.

Conclusion

The recent trends and case law reflect a nuanced, discretionary approach that prioritises the child's best interests while adapting to the changing global contexts. Practitioners must stay informed about legislative developments, case law and practical strategies to prepare and navigate these complex cases effectively.

With continuing globalisation shaping family dynamics, the evolution of international relocation cases will remain a critical area of focus in ensuring the well-being of children and families.

The judicial approach has evolved over time. At present, the correct approach remains that the only principle that these cases should be decided on is in accordance with the welfare of the child, following a global, holistic welfare evaluation of each and every option, compared against each other to determine where the child's interest lies.

FINLAND

Law and Practice

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Pekka Tuunainen Attorneys Ltd is a Helsinki-based boutique law firm focusing on family law and trust and estate advisory and litigation. Firm owner Dr Tuunainen (S.J.D.) is one of the leading attorneys in the field of family and inheritance law. The firm has a strong international dimension, in both clients and cases, with expertise in the international enforcement of foreign judgments; enforcement questions regularly arise in child matters and in child custody and other child-related situations. The firm's child law practice focuses almost entirely on cases with an international aspect, with recent highlights including working on a child relocation and visitation rights matter with connections and judgments from four different jurisdictions, and handling the negotiation of a child relocation between foreign parents living in Finland.

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PEKKA TUUNAINEN ATTORNEYS LTD

1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

Parental responsibility and powers over a child are set out in the Act on Child Custody and Right of Access (Law 361/1983), which states that a custodian who has parental responsibility for a child shall ensure the child's well-being, development and care. For this purpose, the custodian has the right to decide on the care, upbringing, education, place of residence, hobbies and other personal matters of the child. The custodian also represents the child in matters concerning his or her person, unless otherwise provided by law.

1.2 Requirements for Birth Mothers

The person who gives birth to a child is the mother of the child and is, by law, the custodian of the child with parental responsibilities. There are no requirements other than parenthood itself.

1.3 Requirements for Fathers

The father of a child is also, by law, the custodian of the child with parental responsibilities. There are no requirements other than parenthood itself.

1.4 Requirements for Non-genetic Parents

When a non-genetic parent has been granted the legal status of parent, he or she will automatically have parental responsibilities. These situations are mainly related to same-sex couples.

In addition, custody rights for a child (similar to parental powers) can be awarded to any adult person if this is in the best interest of the child. This person does not have to be a parent; the child can have both parents with parental responsibilities and also have a third person with court-granted parental responsibilities. The main requirement is that such non-parent custodianship is in the best interest of the child, and that this person is suitable as a custodian and able to take care of parental responsibilities. If the child already has two parents, a third person with parental responsibilities can be ordered only in extraordinary situations.

Normally, these non-genetic parent custodians are used when a child does not have another parent and the parent's new partner wants to have legal status with parental responsibilities but adoption is out of the question.

1.5 Relevance of Marriage at Point of Conception or Birth

The marriage of the mother and father has relevance at the point of birth. The husband is the father of a child if the child is born during the marriage of the mother who gives birth to the child. This has been the legal principle in Finland for many decades. In this respect, the point of conception does not have relevance.

The time of conceiving can have relevance in cases when the husband has died during the pregnancy. If the marriage has been dissolved before the birth of the child due to the death of the husband, the husband is the father of the child if the child was born at such a time that the child could have been conceived before the husband's death. However, if the mother has entered into a new marriage before the birth of the child, the latter husband is the father of the child according to the main rule.

1.6 Same-Sex Relationships

In situations where there is no legal presumption of fatherhood due to marriage and the mother who gave birth to the child had received assisted fertility treatment from an official fertility clinic, the woman who, in agreement with the birth

mother, had consented to the treatment can be established as the second mother of the child in addition to the birth mother. When such motherhood is verified, both mothers have parental responsibilities according to law.

Male couples do not have the same possibility, but it is possible to award custody to a same-sex partner, and said custodian will have the same parental responsibilities as the parent (but no legal obligation to provide alimony). Custody can be granted by the court and it is relatively easy to obtain a custody order for a same-sex partner if the child only has one parent/custodian.

It is also possible to use interfamily adoption if a same-sex couple is married. If all parties are willing to partake in the adoption, the court normally grants adoption and the same-sex couple partners both become parents with parental responsibilities. All these possibilities can be used by female couples as well.

1.7 Adoption

When adoption is granted by the court, the adoptive parents automatically become parents and have all the parental responsibilities and powers. There are no extraordinary requirements in this regard.

After an adoption, the biological parents are irrevocably exempt from all parental responsibilities.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

Moving abroad requires consent from the other parent if said parent has custody rights, which parents always have if not otherwise ordered by the court; it is quite rare for all custody rights to be taken from a parent by court decision.

2.2 Relocation Without Full Consent

If consent from the other parent is not available for relocation, a parent can make an application to the local court, which can then decide whether relocation is allowed.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

There is no specific legislation or other official guidelines regarding relocation situations, which must be handled on a case-by-case basis by the court. On the other hand, there is not very much published court practice of such situations, but the key factors that determine these cases can be outlined.

The main factor is always the best interests of the child. This means that the child must have at least the same level of care and educational and personal development possibilities in the new location as he or she would have in Finland.

The reason the parent is requiring relocation is also part of the consideration. If the parent has a legitimate reason to move, this can be taken into account. Such reasons can be career-related or health-related, and in some cases can relate to family and the ability to take better care of the child in another country.

If the relocation of a child would have a significant impact on the realisation of parental responsibilities or the right of access to said child, the non-moving parent's rights will also be considered. Loss of contact or reduced contact for such parent is always considered carefully.

2.3.2 Wishes and Feelings of the Child

If the child is mature enough, his or her opinion can be taken into account, but a child's wishes and feeling are never decisive alone. An older child's wishes can have significant value, but even in these situations the child's education possibilities must be guaranteed in the future.

In practice, the wishes and feelings of the child have little effect, especially when children are younger.

2.3.3 Age/Maturity of the Child

If a child is younger than 12, the courts are very reluctant to take the child's opinion into account, but it can have relevance. If a child is 12 years, his or her opinion must be taken into account, but in practice this does not have very much effect. Children who are 16 and older, and are mature enough, have much more say in their own matter in practice.

The most difficult cases relate to children between 12 and 15 years of age. For example, if a child has some specific skill they are determined to pursue that would be more favourable in the new location, this can have significance even when it comes to such younger children.

2.3.4 Importance of Keeping Children Together

Keeping children together has high priority. If both parents are able to take care of the children, it is possible to have children living in different countries.

In cases when the other parent is moving out for a fixed time period, whether all children should move or whether the younger ones should stay in Finland with the other parent is seriously considered.

2.3.5 Loss of Contact

Loss of contact between a child and parent has significant weight in consideration. One of the main principles is the child's right to have contact with both parents. It is stated in law that the right to access and contact is to ensure that a child has the possibility to establish and maintain a positive and close relationship with the parent with whom he or she does not reside.

It is also a parent's responsibility to avoid any behaviour that is likely to cause detriment to the relationship between the child and the other parent. One of the key factors in this respect is to have active and working contact between the child and the parent not living with the child.

Of course, this must be considered in the scope of the factual relationship of the child and parent who would be staying in Finland. If there is no real contact between the parent and child, or if the parent is not using his or her visitation rights actively or has irregular patterns with his or her visitation rights, loss of contact has less value in consideration. In such cases, the possibility to have contact via video and phone calls could suffice.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

The most favourable situation for applicant parent is if an application to the court is reasoned with a credible plan that the child will have access to high-quality education and that his or her social contacts will not be lost, and the child will have a safe and caring environment.

It is also important to have some kind of proof and reasoning that the child has the aptitude and, if old enough, willingness to relocate to the new environment.

If a parent is relocating due to work or business, this can be considered in favour of relocating. In some cases, if the parent does not have a social network in Finland (perhaps after divorce), said parent moving to a native country can be viewed in a favourable light.

With older children (over 13 years of age), the child's possibility to see other cultures and live abroad seems to have court sympathies, especially if the child is mature enough to state this himself or herself.

If the other parent has had problems with bringing up the children and social workers have intervened, courts could see this as a favourable reason to relocate for the other parent, but it is never a standalone reason to relocate if it has not been a life-threatening situation.

2.3.7 Grounds for Opposition to Relocation

The main reason to oppose would be loss of contact and visitations if there have not been problems previously. Even if there are problems and a lack of interest from the opposing parent, he or she still has quite a strong case.

Losing a connection to a native country also has significance if the relocation would be definitive.

The political or economic instability of the relocation country can have great significance when opposing relocation.

One practical ground to oppose relocation is language issues and educational problems connected to that. Of course, this ground must be assessed on a case-by-case basis, taking into account the child's age and ability to speak and learn foreign languages.

A child's health issues can also have relevance if proper care is not guaranteed or if there is a fear that treatment can suffer due to moving out of the country.

2.3.8 Costs of an Application for Relocation

These cases are always handled by the court, which means costs will usually play a significant role. To take a relocation case to court when a claim is professionally opposed, the attorney fees are in the range of EUR8,000 to EUR15,000. If appealed, a similar amount must be reserved for the court of appeal's handling and hearing.

In child matters, parties bear their own legal costs even when they "win" the case; only under special circumstances can the other parent be ordered to pay the opposing party's legal costs. That would happen if an application is opposed on totally false grounds, especially when such actions have prolonged the handling of the case extensively.

If a parent cannot afford to pay legal fees, he or she is entitled to state legal aid, but in these cases legal fees are limited and not all lawyers accept such cases.

2.3.9 Time Taken by an Application for Relocation

Typically, such application is handled in six to 12 months, depending on how the application is opposed and in what city the case is handled.

Handling times tend to be quite long, but it is possible to claim an interim decision from the court if there is a need to settle a situation immediately. In relocation cases, interim decisions allowing a child to move out of the country are seen only in rare cases involving some extraordinary situation.

If the court decides to request a valuation of the children's and family's situation from the social welfare office, an additional three to five months must be added. In relocation cases, this could be used, for example, to find out the children's own wishes and opinions.

2.3.10 Primary Caregivers Versus Left-Behind Parents

In these cases, courts tend to have sympathies towards the left-behind parent, which is understandable due to the fact that the relationship between a parent and child must be given high priority.

Since families are more international and such cases are seen more and more in Finnish courts, a shift from this point of view to another direction is gradually taking place, and solid legal grounds presented to a court can change this sympathy to the primary care giver's side.

2.4 Relocation Within a Jurisdiction

If a primary care giver plans to move within Finland, he or she is required to notify the other parent of his or her intention to move, if the move would have an impact on the realisation of child custody or right of access. The law also states that such notification shall be made well in advance – if possible, at least three months before the intended move.

If the move is to a nearby location, when it usually does not affect visitation rights, it cannot be opposed by the other parent. If the child's school would also change, this could raise questions if the child is receiving special tutoring or has skills that require attending a certain school. Other than this, the primary care giver can move freely to nearby locations.

If the new location would be further away in a totally new city within Finland, the move should be discussed between the parents. If the move does not affect visitation rights, it is in principle allowed, and in practice visitation rights can normally be secured even after the move, as Finland is not a very large country. It is also considered to be in the child's interest that the primary care giver parent can move if this allows him or her to support their family with increased finances due to new work that requires moving.

The biggest problems arise if children live on a week-by-week basis with each parent. In these cases, the move is not normally allowed by the other parent, and the moving parent must take the case to court if he or she must move. The court will then decide where the children will live, and the parent who is not moving seems to have better chances of having the children live with him or her, and the other parent will have lesser visitation rights after moving.

If a case is disputed, it is always possible for each parent to ask the court to state where the children should live, whether they should move with the primary care giver and, if so, how visitation rights are determined. In extremely disputed cases, the court can even state which school the children should attend and give other orders on parental responsibility matters, although courts are reluctant to give such orders unless necessary.

These are the main rules if a parent would move within Finland. Generally, the above-mentioned rules that apply when relocating to a foreign country will also apply when moving within Finland.

3. Child Abduction

3.1 Legality

It is illegal to take a child out of Finland without consent from the other parent with the intention not to return to Finland. This is considered child abduction.

Finland is a signatory of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the Hague Convention) and, as a member of the European Union, is also bound to the new Brussels IIa Regulation (Council Regulation (EU) 2019/1111), which partly regulates and improves the efficiency of the procedure related to child abductions between EU countries.

International child abduction is also punishable under the Criminal Code (Section 25:5a). The minimum penalty is a fine, and the maximum punishment is two years' imprisonment.

The person who abducted the child may also be found guilty of other criminal activities. These can include deprivation of personal liberty, aggravated deprivation of personal liberty and hostage taking, all of which are more serious offences than child abduction itself.

3.2 Steps Taken to Return Abducted Children

If a child has been removed from Finland without the consent of the other parent (or non-parent legal guardian), the Central Authority is the key access point in such cases. In Finland, this is the Ministry of Justice's Unit for International Judicial Assistance.

The procedural steps are set out whether the child has been taken to a country that is a signatory to the Hague Convention or not. These situations are explained separately below.

Hague Convention Countries

If the child has been taken to a Hague Convention country, the parent or their legal counsel should contact the Finnish Central Authority at the Ministry of Justice. The ministry will then provide an application form for the return of the child and, if necessary, provide instructions on filling out the application with the required information. This information must include at least the following:

- information of the applicant and the parent (or other individual) who has taken the child out of the country;
- the child's personal information;
- the legal grounds upon which the return of the child is based;
- the relevant grounds relating to the child's custody and residence in Finland;
- a description of the situation in which the child has been taken out of Finland;
- information relating to the location of the child;
- a documented custody decision;
- proof of the child's daycare or school attendance;
- an authorisation granted to the Central Authority to handle the case; and
- photographs of the child and the parents.

When the application is received by the Central Authority at the Ministry of Justice, it is checked that it contains all the necessary information and attachments. If a translation of the attached documents is required, the Central Authority will take care of the translations ex officio and cover the cost for that. The application is then sent to the Central Authority in the country to which the

child has been taken. The case is then in the hands of said country's authorities.

In these Hague Convention situations, Finland's Central Authority functions promptly and follows international regulations. It must be kept in mind that the Central Authority is not representing a parent who is seeking the return of a child, although it has an informative and helpful attitude towards a person who is seeking the return of a child. In practice, the parent should be represented by a Finnish attorney from the moment the Central Authority is contacted for the first time.

Non-Hague Convention Countries

If the child has been taken to a non-Hague Convention country, Finland's Central Authority does not have powers but does provide general information on how to proceed. A Finnish attorney specialising in international family matters is crucial in such cases.

In these non-Convention cases, official help and guidance are given upon application by the Ministry for Foreign Affairs, which can assist in finding the facts and help with the return request of the child abduction. A key role in these cases is played by Finnish missions abroad. Regulation on these cases is contained in the Consular Services Act (Sections 31–32). The Ministry for Foreign Affairs and Finnish missions can provide assistance in the following ways:

- determining the location of the child and the contact details of persons who could have information about the child;
- contacting the parent who has taken the child and seeking the voluntary return of the child;
- assisting to find a local lawyer to start local legal proceedings;
- delivering general information on the legislation of the country in question;
- helping in communication between the parties;
- most importantly, helping with delivering information and documents on the return of the child to the authorities and the person requesting the return of the child; and
- helping to organise the return of the child.

The Ministry for Foreign Affairs and local Finnish missions have very limited possibilities for assisting in the return of the child from a non-Convention country. They are in no way representing the parent as a legal adviser, so there is a need to obtain legal assistance both in Finland and in the country to which the child has been taken.

In these non-Hague cases, the return of the child depends mainly on the willingness of the parent who moved the child to co-operate, the co-operation of local authorities, and the local legislation on child abduction cases.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

Brussels II or Hague Convention Countries

If a child is taken to Finland, Hague Convention rules and the Brussels II Regulation between EU countries will apply, as Finland is a signatory to the Hague Convention. In these cases, the procedure and principles are as follows.

When the application is received by the Finnish Central Authority either from the other (child's residency) Central Authority or directly from the parent, the Ministry of Justice will assist the parent to find an attorney with knowledge of such child abduction cases, if he or she does not already have an attorney in Finland. First, the attorney must seek a solution to the voluntary

return of the child. If this is not possible, the proceedings on the case concerning the return of the child must be taken in the Helsinki Court of Appeal, which processes all Hague Convention signatory country applications for the return of a child. It is possible to appeal to the Supreme Court, but this requires the Supreme Court to grant leave to appeal.

The parent may also submit the application for the return of the child directly to the Helsinki Court of Appeal. Contacting the Central Authority and obtaining their guidance is not mandatory if the parent is seeking the return of a child from Finland.

Costs

The Central Authority's services are always free of charge. Legal advice is free of charge to parents requesting the return of a child. Costs are paid by the state; the right to have free legal aid is not connected to the income or assets of the applicant.

If the parent does not have a Finnish attorney, it is advisable to contact Finland's Central Authority, which will normally forward the case to a local attorney or government legal aid officer. The local attorney takes care of cost-related matters, and the procedure is relatively smooth and easy for the applicant parent; as mentioned, all applicants are entitled to free legal aid.

If the applicant wishes to use a certain attorney, his or her costs are not necessary compensated in full as fees are capped in the government legal aid system. On the other hand, when the court orders that a child must be returned, the court may at the same time, upon the request of the applicant, render the opposing parent liable to compensate the applicant's legal fees. On the same grounds, he or she shall be rendered liable to compensate the Ministry of Justice for the costs incurred by the Ministry.

The court handling at the Helsinki Court of Appeal is also free from the government fees normally levied for court handlings.

The Finnish Central Authority and Finnish courts rigorously and promptly apply the underlying principle of the Hague Convention of the immediate return of a child, and the applicant parent will be served justice in Finland in these cases. This is partly guaranteed by national legislation (Section 35 of the Act on Child Custody and Right of Access), which orders state social welfare authorities, the municipal social welfare authorities and the police to provide executive assistance to the Ministry of Justice to search for the location of a child and to find out his or her circumstances.

Timeframes

The Central Authority in Finland works efficiently and is adequately funded. The timescale for handling at court is strictly set out by law and applied in practice. Applications to court concerning the enforcement of a decision issued in a foreign state and the return of a child must be handled urgently.

Judgment must be made within six weeks from the submission of the application. This timeframe includes all written hearings. If the court (Helsinki Court of Appeals) has not reached a decision in a case within six weeks, it must provide a statement of the reasons for the delay, upon the request of the Ministry of Justice or the applicant.

The above-mentioned principles and procedures apply in full scale to cases where the applicant parent is seeking return to a Hague Convention

country or an EU country if that country was also the child's residency.

Non-Brussels II or Hague Convention Countries

The procedures that apply to an application to return an abducted child to a country other than Brussels II Regulation or Hague Convention countries are as follows.

The main rule is that foreign judgments of a child's residency and visitations are recognised in Finland without separate confirmation. If it is questionable whether the foreign judgment or decision is recognised in Finland, the Helsinki District Court may, upon application, confirm whether the decision is recognised in Finland. As a main rule, this application is not needed. The translation of such foreign decisions into Finnish or Swedish with apostille should suffice.

The enforceability of such foreign decision is more important. Exequatur is needed in Finland in these cases. If the decision is enforceable in the state where it was issued (ie, the state of origin), it can be enforced in Finland if the Helsinki District Court has confirmed, upon application, that the decision is enforceable here (exequatur). Note that these cases are handled at the Helsinki District Court, while Hague Convention applications are handled at the Helsinki Court of Appeals.

The original or an officially certified copy of the foreign decision must accompany the application, and the original or an officially certified copy of documents stating why the decision has been granted without hearing the opposing party must also be supplied, if applicable.

An application of exequatur must also include an adequate statement of the enforceability of the decision in the state of origin. Such statement can be given, for example, by a local attorney, a local court or another judicial officer.

If the Helsinki District Court grants exequatur and the decision is enforceable in Finland, the court shall, upon request of the applicant, submit the decision and the application for final enforcement to the competent district court, if the issuing court has not restricted enforceability until such time as the exequatur has final legal force. The local district court where the enforcement case is ultimately put into force must ensure that the decision is enforced urgently.

As explained, if the applicant parent has a foreign decision from a non-Convention country, it is possible to enforce such decision in Finland if it is enforceable in the state of origin. In these cases, the procedure is based on the applicant's own applications, and enforcement itself is ultimately handled as national enforcement. Returning a child in these cases more or less requires the application parent to be present in Finland or at least to have proper representation; in most cases, the co-operation of enforcement offices in both countries is also required, which can be difficult with non-Convention countries. Legal advice is definitely needed in both countries, and especially in Finland as the application process for possible recognition and exequatur and the enforcement procedure are quite complex.

There is one additional possibility if a parent has a foreign decision stating that the removal or retention of a child has been wrongful. If such decision has been issued in a contracting state to the Council of Europe Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Luxembourg on 20 May 1980), the Helsinki District Court may, upon application,

confirm that this decision is enforceable in Finland, if no decision has been issued in a contracting state to said European Convention that could have served as a basis for enforcement according to the European Convention. These cases are very limited in practice, but this offers more straightforward enforcement in abduction cases, if applicable.

A relatively small number of child abduction cases are handled in Finland. In 2023, a total of 25 children were taken out of Finland and a total of 54 children were under abduction by the end of 2023, 27 of whom were in Hague Convention countries (including ones abducted in previous years). In 2023, a total of 22 children were wrongfully in Finland due to accused abduction.

Detailed statistics can be found on the website of trusted NGO Abducted Children Finland (in Finnish), at www.ensijaturvakotienliitto.fi.

3.4 Non-Hague Convention Countries

This is not relevant, as Finland is a signatory to the Hague Convention.

FRANCE

Law and Practice

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

In France, the principle in question is that of parental authority – *autorité parentale* – defined by Article 371-1 of the French Civil Code: "Parental authority is a set of rights and duties designed to protect the interests of the child. Parental authority is vested in the parents until the child reaches the age of majority or is emancipated, in order to protect the child's safety, health, privacy and morality, to ensure the child's education and to enable the child's development, with due respect for the child's person. Parental authority is exercised without physical or psychological violence. Parents involve their children in decisions that concern them, in accordance with their age and degree of maturity".

1.2 Requirements for Birth Mothers

The indication of the name of the mother on the birth certificate establishes the filial link between the mother and the child, and grants the mother parental authority over the child. The mother can also acknowledge parentage of the child before the child's birth.

1.3 Requirements for Fathers

If the mother is married, the presumption of law is that their child is that of the father who, by law, has parental authority.

The father could acknowledge parentage of the child before their birth. In this case, the father will automatically have parental authority over the child upon the child's birth. The father could also acknowledge parentage after the child's birth. In this case, by law, the father would have parental authority if acknowledgment of parentage is made within the year following the birth.

Failing this, the father would have to request a joint statement with the mother, and, if the mother is not in agreement, the father would need to make a request for joint parental authority to the family court.

Note, also, that paternity is established as a result of court proceedings filed by the child (ie, the mother files to establish paternity in the child's name while the child is still a minor), the civil court decides whether or not to grant parental authority to the father.

1.4 Requirements for Non-genetic Parents

In domestic cases, a non-genetic parent can only be granted parental authority through a court decision known as "delegation of parental authority" (*délégation d'autorité parentale*), or after an adoption.

However, if parentage is only established with one parent, then the parent who is not a genetic parent could voluntarily recognise the child by indicating that they are the parent of the child. There will be no verification of biological or genetic connection in this case.

1.5 Relevance of Marriage at Point of Conception or Birth

No relevance is attached to marriage at the point of conception or birth of a child under French law. However, there is one exception: if the mother is married, the presumption of law is that the child is that of the father who, by law, is granted parental authority.

1.6 Same-Sex Relationships

Once the filial link between a parent and child is established in a same sex-couple, the French Civil Code establishes a principle of equality. Marriage or adoptive filiation entails the same effects, rights and obligations as those recognised by law, whether the spouses or parents are of different sexes or the same sex (French Civil Code, Article 6-1).

However, same-sex couples – particularly male couples – do not have the same route to parenthood as heterosexual couples, and therefore parental authority is not established under the same conditions.

1.7 Adoption

One consequence of adoption is the benefit of parental authority for the adoptive parents.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

In France, where one parent wishes to change a child's place of residence permanently from the family home to a new country, the consent of those exercising parental authority – ie, in principle, both parents – is required.

2.2 Relocation Without Full Consent

If the required consent cannot be obtained, the intervention of a family judge is generally requested by the parent who wishes to relocate to the new country, who will ask to modify the terms and conditions of parental authority. This demand is governed by Articles 373-2-6 et seq. of the French Civil Code.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

Under Article 373-2-11 of the French Civil Code, the following will be taken into consideration by the judge in issuing a decision:

- general practices followed by the parents or any agreements they may have previously entered into;
- the feelings expressed by the child under the conditions set out in Article 388-1;
- the ability of each parent to assume their duties and respect the rights of the other;
- the results of any expert appraisals carried out, taking into account the child's age;

- information gathered in any social investigations and counter-investigations provided for in Article 373-2-12; and
- physical or psychological pressure or pressure exerted by one of the parents on the other.

Also, in application of the Article 373-2 of the French Civil Code, a judge will require that the second parent be informed in a good time of the planned move.

A decision will be made based on these criteria, and on the judge's sovereign assessment of the claim.

The best interests of the child will always remain the main criteria taken into account, as provided by Article 9§3 of the International Convention on Children's Rights. This is constitutionally protected, as provided by decision No 2018-768 of 21 March 2019 of France's Conseil Constitutionnel.

2.3.2 Wishes and Feelings of the Child

Under Article 388-1 of the French Civil Code, "In any proceedings concerning him or her, a minor capable of discernment may, without prejudice to the provisions providing for his or her intervention or consent, be heard by the judge or, where his or her interests so require, by the person designated by the judge for this purpose. The minor is entitled to be heard if he or she so requests".

The feelings and wishes of a child will be taken into account if the child is considered sufficiently mature. Otherwise, the situation will be treated like any other subject to Article 373-2-11 of the French Civil Code, and where they will reside will not be considered to be the decision of a young child.

Case law from the French courts of appeal and the Cour de Cassation (the Supreme Court for all civil, commercial and criminal cases in France) and from the European Court of Human Rights provides that young children cannot choose whether they live with their mother or father.

2.3.3 Age/Maturity of the Child

The age and maturity of children can influence the judge as the children grow up and gain more perspective. However, the principle endures whereby the choice of place of residence does not take into account the preferences of a minor.

2.3.4 Importance of Keeping Children Together

A judge will always consider that it is in siblings' best interests to stay together, and will not wish to separate them, as provided by Article 371-5 of the French Civil Code: "The child must not be separated from his or her brothers and sisters, unless this is not possible or if his or her best interests require another solution. If necessary, the judge rules on personal relationships between brothers and sisters".

2.3.5 Loss of Contact

A parent who goes to live abroad must prove that they will maintain ties with the parent left behind, unless this is not in the interests of the child, for specific reasons. It the child's right to maintain regular contact with both parents, as provided by Article 373-2 of the French Civil Code: "Parental separation has no effect on the rules governing the exercise of parental authority. Each parent must maintain a personal relationship with the child and respect the child's ties with the other parent."

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

The parent moving will have to prove that they are doing so for compelling personal, economic or professional reasons. A parent offered a promotion, a transfer or an unavoidable job proposal, who informs the other parent in good time and requests the transfer of the child/children's residence to their new home tends to be looked upon sympathetically by a judge.

2.3.7 Grounds for Opposition to Relocation

If the applicant succeeds in proving that there is no compelling reason for disallowing a relocation but there is a risk that they might not respect the relationship between the child and the second parent and if, under all the criteria of Article 373-2-11 of the French Civil Code, moving appears to be against the child's best interests, the judge will prohibit the relocation.

2.3.8 Costs of an Application for Relocation

This depends of the hourly rate of the lawyer. Representation by a lawyer is not mandatory for such cases, but it is strongly recommended. For appeals, representation is compulsory.

2.3.9 Time Taken by an Application for Relocation

The application may last between four and eight months, depending on the jurisdiction and the form of the application (classic, or under an emergency proceeding).

2.3.10 Primary Caregivers Versus Left-Behind Parents

In France, judges tend to favour of the parent left behind, whilst appreciating the compelling reasons justifying a relocation.

2.4 Relocation Within a Jurisdiction

If one of the parents moves within France, the extent to which the rights of the other parent will be affected must be looked at. If these rights are significantly affected, a decision needs to be made as to whether the reasons for the move are justified, and whether a move is right for the child. As in the case for relocations abroad, the judge will assess the various elements presented in concrete terms, and a decision will be based on a sovereign appreciation of these elements.

3. Child Abduction

3.1 Legality

Under French law, if parents have joint custody, meaning parental authority (which is the principle), they can travel abroad with their child without one another's formal consent. However, if one parent wants to relocate permanently with the child to another jurisdiction, the consent of the other parent is mandatory. If consent is not given, as explained in **3.2 Steps Taken to Return Abducted Children**, the parent who wishes to move will need the authorisation of the court to relocate with the child. A relocation without such consent is a child abduction.

3.2 Steps Taken to Return Abducted Children

If a child has been removed from France without the relevant consent, the other parent could act as follows.

First, contact the French Ministry of Justice (Department of Mutual Assistance, Private International and European Law), which is the central authority in matters of child abduction cases, to request international civil cooperation. Depending on the country to which the child has been removed, different remedies will exist.

- If the Country has signed the 25 October 1980 Hague Convention, the French Ministry of Justice will explain to the parent what needs to be done to ask for the immediate return of the child to France, depending on the practice of the country to which the child has been removed (whether they need to file directly to the country, need a lawyer, what kind of documents must be provided, etc).
- If the Country has not signed the 25 October 1980 Hague Convention but another mutual agreement on child abduction with France, the same applies as for the Hague Convention, and the convention also exists with Algeria, Egypt and Djibouti.
- If the Country has not signed the Hague Convention or any other mutual agreement with France on child abduction, the French Ministry of Justice will recommend that the parent seek legal advice directly on the country to which the child has been removed as well as from a French lawyer specialised in such cases. The Ministry of Foreign Affairs in France will assist the parent in collecting information on the child's situation through diplomatic representation.

In all cases, the Ministry of Justice will propose international mediation if possible.

Second, file a criminal complaint for child abduction. This is not recommended where international civil cooperation is possible, particularly when the 25 October 1980 Hague Convention applies to the case. This type of criminal complaint could in fact complicate the immediate return of the child.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

France signed the 1980 Hague Convention on 1 December 1983.

If a child is unlawfully taken to France, there is no free legal advice available to the parent of the abducted child. However, the French Ministry of Justice will explain the proceedings applicable in France to the central authority of the country of habitual residence of the child in question. The central authority does not have the right to advise the parent on any strategy and should respect the parent's capacity to act, according to the Hague Convention.

The French courts generally rigorously apply the principles of the Hague Convention, both on the principle of immediate return and on the strict interpretation of exceptions to return. The Cour de Cassation (the Supreme court for all civil and criminal cases in France) frequently reacquaints with its principles any courts that might be tempted to revise those principles more flexibly. Applicable proceedings – from the petition to court to a first decision – usually take more than six weeks, contrary to information provided by Article 11 of the Hague Convention.

If the child is abducted from France into a country not bound by the 25 October 1980 Hague Convention, the child's parent should seek legal advice in France and/or directly in the country of abduction to obtain a decision on custody. As mentioned in **3.2 Steps Taken to Return Abducted Children**, the parent could also seek the assistance of the French Ministry of Justice. However, usually, even if the country of abduction has signed a bilateral agreement with France on judicial cooperation in matters of custody, there are no specific proceedings for requesting the return of a child that are at least comparable to those provided for by the Convention. There will generally only be an exchange of information between the central authorities appointed in the bilateral agreements and support in respect of

the country of abduction in terms of diplomatic representation via the Ministry of Foreign Affairs.

The costs of a child-abduction case depend on many criteria (stance of the second parent, arguments raised in defence, appeal on the decision – in France, appeal is an absolute right). Appointing a lawyer is not compulsory, but is strongly recommended. The French courts usually require the parent that has removed the child to pay part of the costs of the proceedings (including lawyers' fees) under Article 26 of the Convention. The parent will, however, be able to ask for legal aid for proceedings in France in the event of litigation. The parent should match the conditions provided by French law on legal aid.

The average timescale for applications under the Hague Convention, from the initial petition to court until a final decision of the court of appeal (without including a appeal before the Supreme Court) is usually six months, although it depends on the local court.

3.4 Non-Hague Convention Countries

France signed the 1980 Hague Convention on 1 December 1983.

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Trends and Developments

Contributed by:
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Over the last twenty years, the number of French expatriates has increased by 52%. This trend will naturally involve separated couples, and therefore necessarily raises the question over the place of residence of children.

Unfortunately, French practice shows that parents do not prepare sufficiently for relocations and, as a result, are often very surprised to see their application to relocate refused, or, even worse, to see their child's residence transferred to that of their former partner, their child's other parent.

Current case law in France and recent European law could make it possible to deal with such moves more smoothly while safeguarding the best interests of children – the groundwork of practitioners charged with handling relocations – or at the very least to anticipate children's needs and clear up any obstacles that may stand in the way of a move.

French Law in This Area

For all relocations, either domestic or international, French law is governed by two principles of Article 373-2 of the Civil Code, as follows:

- "Any change of residence by one of the parents, where it alters the arrangements for exercising parental authority, must be notified in advance and in good time to the other parent. In the event of disagreement, the more diligent parent shall refer the matter to the family court, which shall rule in accordance with the best interests of the child".
- "The separation of the parents has no effect on the rules governing the exercise of parental authority. Each parent must maintain a personal relationship with the child and respect the child's ties with the other parent".

There are no specific rules governing "international" relocations under French law.

The International Convention on the Rights of the Child (CRC) states that:

"States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests".

If alternating residence is the preferred arrangement decided by a judge, and if it is considered that the child's interests are best served by maintaining contact with each parent, the question necessarily arises as to which parent the

child should live with permanently once switching between residences is no longer possible.

If the parent with whom the child has a fixed main residence moves away from the other parent who has access and accommodation rights, they risk bearing the consequences of what the judge could consider a personal decision to move, thereby accepting that their child's habitual residence will then be transferred to the other parent.

In this situation, if the parent with whom the child has their habitual main residence still plans to move, a French judge would generally transfer the child's main residence to the remaining parent if the latter so requests.

Therefore, while, for example, the UK courts tend to be pro-relocation, the French courts generally take the opposite view.

Current Case Law – a Few Provisions Allowing for Relocation

If the move seems justified and not just the result of a personal whim, then there is every reason to prepare for it as well as possible. An analysis of recent French case law in this area shows that, in the absence agreement for the child to remain with their other parent due to the proposed relocation, there are a few measures to ensure that a move can go ahead.

These should be applied by the parents and their lawyers to reach an agreement that will satisfy the parent who did not initiate the move, who is generally very concerned about losing their connection with their child.

First, the parent wishing to move must prove that they can ensure that, if the child moves with them, they will be able to help support the child in maintaining their relationship with their other parent. Judges strictly assess this. Regular telephone or videoconference contact must therefore be offered if the other parent is unable to exercise regular visiting and accommodation rights during school term time. Judges are sensitive to one parent's ability to pay attention to and respect the rights of the other parent, particularly when considerable distance is involved.

Second, judges will be more inclined to authorise the departure of a child with his or her parent without transferring the residence to the parent who remains if the request of the relocating parent to transfer the child's residence to their new home – due, for example, to a promotion, a transfer or an unavoidable job change, and who informs the other parent of this in good time – is well founded, subject to their sovereign assessment.

Similarly, the judge will take into account the attempts made by the other parent to try to find an amicable solution before filing with the Court.

On this precise point, French judges will endeavour to establish whether the parent who took the initiative to move could not find an equivalent professional position in their current place of residence. They will work very hard in this respect, on the basis that the child's enduring relationship with one parent should not be governed by decisions that suit the other.

If the move is purely for reasons of convenience, the parent who wishes to relocate is unlikely to be allowed to leave with the child even if they are the parent with whom the child has their main habitual residence.

Finally, both when an agreement is reached between the two parents and when a judge is

involved when an agreement cannot be reached, the parent who initiated the move must prove that they informed the other parent of their relocation plan in good time. Proof must be provided that a plan is being considered and that the parent is seeking the other parent's approval. All too often, cases have been seen where a decision is made and the second parent is simply expected to accept it. If information is not provided in good time, judges will now tend to penalise the parent wishing to relocate and, in order to avoid a judgement-of-Solomon-type scenario, transfer residence of the child to the parent remaining in France.

Case law does not consider certain personal motivations, such as parent who has the daily care of a child wishing to rebuild their life and move closer to their new family, to correspond to factors or criteria that are in a child's best interests, often refusing to allow the child to move with the parent on these grounds. Recent French case law has established that if one parent wishes to move, they must take the risk of assuming the consequences unless it can be shown that the move, while not an unavoidable opportunity, is an opportunity for the child and in the child's best interests.

These cases therefore require a great deal of preparation. The plans of the parent wishing to move must be presented very precisely if an amicable agreement is to be reached with the other parent or with a judge if no agreement is possible.

Finally, it should be noted that moving abroad can sometimes be seen as an opportunity for children.

Recent European Law Provisions

In relocation cases, a refusal from the parent left behind could be due, among other things, to a fear of losing their ability to apply to the French court, and having to apply to a foreign judge if the situation between themselves and the other parent becomes difficult in any way after the latter's relocation.

The Brussels II ter Regulation came into force in France in August 2022 and allows parents to elect, before any conflict (14), the relevant court to rule on questions relating to parental responsibility (except in the case of international wrongful removal), which must be the court of a member state.

This choice of court subsequent to the move could therefore offer protection for a parent who might see their child less regularly, supporting them in accepting the other parent's move with their child if they consider it to be for legitimate reasons.

However, the choice of court in question excludes any other jurisdiction only if it is made once the dispute has arisen, and not in advance.

HONG KONG SAR, CHINA

Law and Practice

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Withers is one of the world's first international law firms dedicated to the business, personal, and philanthropic interests of successful people, their businesses, families, and advisers. With more than 220 partners and more than 1,500 employees in 17 offices across Europe, the USA, Asia–Pacific, and the Caribbean, Withers has unparalleled expertise in helping businesses and individuals across all major financial centres around the world. Its clients' interests span 100 countries, and the firm has acted for 75% of the top 100 UK "Sunday Times Rich List", 25% of the "Forbes 400 List of the Wealthiest Americans", 35% of the "Hong Kong Forbes Rich List", and 35% of "The Sunday Times Top Philanthropists".

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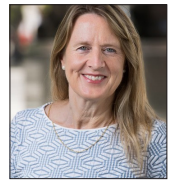

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

"Parental Responsibility" and "Custody"

Parental responsibility

In Hong Kong, despite the Law Reform Commission recommending the parental responsibility model in 2005, the terminology in respect of children's arrangements post-separation and the orders made by the courts daily, remains "custody", "care and control", and "access". The legal fraternity have been very supportive of a change in terminology in the hope that disputes relating to joint and sole custody can be reduced and in recognition that both parents continue to have an active role in the children's lives despite the separation of their parents. The law in relation to children is in need of reform and clarification, and although there is a draft bill – The Proposed Children's Proceedings (Parental Responsibility) Bill – which embraces the change, this has yet to be passed by the government. Many of the provisions are, nevertheless, referred to in family court judgments, despite the lack of legislative change.

Custody

Thus, the equivalent to "parental responsibility" is "custody", being the power of the parents (or certain circumstances, the guardian who can be the Director of Social Welfare) to make major decisions, such as those relating to health, education, and religion on behalf of the child.

The courts can make orders for sole or joint custody. Joint custody is the more common order made by the court, and closest to the concept of parental responsibility, but courts will make orders for sole custody usually when there has been a breakdown in communication between the parents and it is in the child's best interest to order sole custody to one parent. However, it is always open for the "non-custodial parent" to make an application to court relating to those major decisions.

There is no definition of "custody" in legislation and the law has been determined by case law over the years. (See PD v KWW [2010] HKFLR 184, paragraphs 52–57, "Joint custody: the proper approach".)

Care and control, and access

There is also no statutory definition concerning care and control. In practice, care and control relates to the day-to-day care of children and with whom they live most of the time; this can be sole, joint, or shared. Access is the right of the child to access the parent who does not have care and control. This can be "reasonable access" where arrangements are left to the parents to work out between themselves, or "defined access" where an order is made in respect of school days and holidays spent with each parent. In challenging cases, there is also "supervised access" when it is deemed in the children's best interests for access to be in the presence of a third party.

Where the court orders "sole custody", an access order (reasonable or defined) will also be made. Where the court orders shared or joint care, a single order will be made dividing the children's time. "Joint care" tends to be more equal in time shared, "shared" is more like a defined access order, but the terminology is more conciliatory. It is not open to courts in Hong Kong to make "no order".

The power of the courts to make orders in respect of custody can be found in the Guardianship of Minor's Ordinance (GMO), Chapter 13, Sections

3 and 10, and the Matrimonial Proceedings and Property Ordinance, Chapter 192, Section 19.

1.2 Requirements for Birth Mothers

A birth mother will have the right of custody of her child from its birth pursuant to Section 3 of the GMO Chapter 13.

1.3 Requirements for Fathers

The right of custody for a father is equal to that of a mother, unless he is not married to her. If the couple are unmarried, the father does not have automatic legal rights as a parent per se, and must make an application under Section 3(1)(d) of the GMO to satisfy the court that he is the father and to be granted "all of the rights and authority the law would allow him as if the child were legitimate".

1.4 Requirements for Non-genetic Parents

Guardianship

A non-genetic parent can obtain custody of a child if the natural and legal parent makes an application for guardianship in their favour. The Director of Social Welfare can also make the application, as can the child him-/her-self in certain circumstances (AA v BB [2021] HKCFI 1401). Once the application has been made, the court has the power under Section 10(1) of the GMO to make such custody order as it sees fit.

Relevant cases in Hong Kong have involved step-parents and grandparents.

Adoption

The adopting parents of adopted children in Hong Kong have rights of custody (see **1.7 Adoption**).

Surrogacy

It is also possible for a non-genetic parent to obtain custody via a parental order as a consequence of surrogacy. At least one of the parents must be genetically linked to the child. There are numerous requirements for such non-genetic parents beyond the scope of this paper, but recently the Court of First Instance was required to consider whether, on relationship breakdown, custody orders could be made in the context of a surrogacy arrangement in which a parental order had not been obtained. Without a parental order, the wife was not a legal parent and therefore custody rights could not be bestowed upon her. The Court of First Instance, on this specific point found that, in order to be a "child of the family" to whom a custody order would apply, the child did not have to be a biological child of either or both parents: HC formerly known as HWH v WYH [2024] HKCFI 1157.

In all cases, the non-genetic parents (as with any parent) are required to demonstrate to the court that the arrangements to be made for the children are in their best interests, which is the first and paramount consideration of the court. The court must also take into account the views of the children having regard for their age and understanding, and any material information including any reports by the Director of Social Welfare (Section 3 of the GMO).

1.5 Relevance of Marriage at Point of Conception or Birth

Marriage is only relevant at the point of birth in the context of the unmarried father who will need to make an application under Section 3(1)(d) as referred to in **1.3 Requirements for Fathers**, in order to have the same rights as the mother regarding custody. Marriage at the point of conception is irrelevant.

1.6 Same-Sex Relationships

Same-sex relationships are not legally recognised in Hong Kong. However, the courts have not shown any prejudice towards same-sex families in the context of custody and, as long ago as 2005, joint custody was awarded to both parents, and care and control to the mother who had left the father for a same-sex relationship (W v W [2005] HKFLR 312). More recently, in 2021, in the case of AA v BB [2021] HKCFI 1401, the court granted equal parental rights – custody, care, and control – of two children to the non-biological lesbian parent, as social investigation reports and all evidence demonstrated her to be a capable, loving, and dedicated parent to the children and it would be in the children's best interests for her parental rights to be recognised. Recently, in a same-sex case where the parties sought a declaration that the non-biological party was a parent under the Parent and Child Ordinance, the Judge at the Court of First Instance found that she was not able to do this under the current legislation, but that there was a right under common law: NK v R (Secretary for Justice, Intervener) (Declaration of parentage; same-sex couple) [2023] HKCFI 2233. The rationale was that this would give effect to the original intention behind the current legislation, namely that the paramount consideration of the court is always the best interests of the children.

1.7 Adoption

There are a number of requirements under the Adoption Ordinance Chapter 290 which have to be met by the adoptive parents to obtain an adoption order, which will give them rights of custody as if that child had been born to them.

- A sole applicant or two spouses jointly may apply, so no unmarried couples.
- The sole applicant must either be a parent or a relative of the parent, or married to a parent of the child, or over 25.
- The spouses must either be over 21, or one of them must be the mother or father of the infant.
- No sole male applicant can adopt a girl, unless in exceptional circumstances.
- There is a residency requirement – both infant and applicants must reside in Hong Kong and the infant must have been in the care of the applicant for at least six months before making the order, unless one applicant is a parent in which case this requirement reduces to 13 weeks.
- The birth parents must give their consent to free the child for adoption (which, in exceptional circumstances, can be overruled by the court).
- There is a stringent vetting process including health checks, criminal record checks, and an assessment by a qualified social worker.
- No one other than the Director of Social Welfare, a parent, or someone married to a parent can place a child up for adoption.
- The court, in making an adoption order, must be satisfied that this is in the best interest of the child and that the adopters are fit and proper people.
- The court must be satisfied that no reward or consideration has been made in respect of the adoption.

For the purpose of international adoptions, in consideration of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, the consent of the child should be considered (although not a requirement to be obtained under Hong Kong law) and the child should receive counselling and information on the effects of the adoption, depending on the age and maturity of the child: Director of

Social Welfare v LPK (Overseas adoption) [2023] HKCFI 2014.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

Where one parent wishes to move a child of the family permanently out of the family home and to a new country, this can only be done with the consent of the other parent and, if proceedings have been issued, with leave of the court.

2.2 Relocation Without Full Consent

If the required consent is not given, the parent hoping to relocate will have to make an application to the court for leave to permanently remove the child, or, if the child has been removed already, leave to remain outside the jurisdiction of Hong Kong.

The court will have to consider a number of factors in determining whether it is in the best interests of the children to relocate, which are listed in **2.3.1 Factors Determining an Application for Relocation**.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

In a contested removal case, the court will consider a number of factors, the first and paramount being to determine what is in the best interests of the child.

Other factors may include the following.

- There must be a carefully thought-out plan in place for the child, including accommodation, education, and family support in the new location.
- It has been said that for expatriates applying to go "home", the bar is set lower than one for a parent seeking to move children to an unfamiliar location.
- The motivation for the move must be genuine and not motivated by a selfish desire to exclude the other parent.
- The effect on the parents if the application was refused/granted.
- The rights of the parent who has been left behind, and how much contact he or she will have after the move.
- Consideration of the left-behind parent's motivation for refusing consent (Was it genuine?).
- Does the plan make practical financial sense for the family as a whole?
- Disruption of the status quo for the children and their wishes (see **2.3.2 Wishes and Feelings of the Child** and **2.3.3 Age/Maturity of the Child**).

2.3.2 Wishes and Feelings of the Child

- The wishes and feelings of the children are important but may not be the determining factor.
- The court has a statutory duty to consider the child's views.
- There will be a social welfare report which will consider all of the factors listed above. The social welfare officer will see the children and ascertain their views where possible and it is open to the officer to make a recommendation based on their findings. The judge has a wide discretion, including whether or not to follow the recommendations in the report.
- The family court judge may also meet with the children directly to ascertain their views and the level of their understanding.

2.3.3 Age/Maturity of the Child

- The older the child and if the child shows maturity, the more weight will be given to his or her wishes regarding relocation.
- An older child may have strong views which he or she would need to express, which may be less so in a younger child.
- A younger child may not appreciate the ramifications of the move in the same way as an older child and may change his or her mind depending on who the child addresses.
- There is no hard and fast rule about age and maturity, and it will be up to the social welfare officer to assess the child, and then the judge as to whether the recommendation of the officer is to be followed.
- The family court has a very wide discretion when it comes to children. The thoughts and wishes of a mature nine-year-old have been determinative in the family court in the past, but generally the child's views would carry more weight when the child is over 12 years old.
- Children in their later teens often "vote with their feet".

2.3.4 Importance of Keeping Children Together

The family court in Hong Kong will endeavour to keep the siblings together, particularly in cases of relocation where family support is even more important than in a determination for care and control within the jurisdiction. As the best interests of the children is the court's "first and paramount" consideration, keeping the children together would be in their interests in the majority of cases, and normally in line with their wishes.

2.3.5 Loss of Contact

- As referenced in **2.3.1 Factors Determining an Application for Relocation**, the loss of contact between the left-behind parent and the children is an important factor which the court will bear in mind, for that parent but also when analysing what is in the best interests of the children.
- The loss of regular contact with one parent is not, other than in extreme cases, considered to be in their best interests.
- If it is deemed overall that it is in the children's best interests to leave, the court will endeavour to put into place safeguards in respect of future contact in the form of orders for regular holiday access visits, and regular access via telephone, Skype, WhatsApp, or Facetime.
- The parent removing the children may have to give undertakings to the court to co-operate with the left-behind parent in facilitating this.
- In rare cases, such as those involving domestic violence or where the relationship between the children and the left-behind parent has been damaged, the court may order limited access to begin with which may increase over time, sometimes on condition that the parents and/or children attend counselling.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

- In assessing what would be in the best interests of the children, the court may look most favourably on a well-thought-out future plan for the children in which it can be seen that they would benefit from the move, despite losing the status quo and regular contact with the left-behind parent.
- The emotional wellbeing of the primary carer is a factor, but only if it can be demonstrated that a refusal to remove would affect her/him to such a degree that it would not be in the best interests of the children to deny leave to remove.
- It has also been argued successfully that, for a dependant spouse in Hong Kong, there are

limited opportunities for employment and the family would be financially better off if that parent were allowed to move. Similarly, work opportunities overseas for the "breadwinner" may be a good reason to move the family.
- The strong views of elder children would be persuasive. They may very well want to attend their chosen school overseas.

2.3.7 Grounds for Opposition to Relocation

- The court will be most responsive to an argument that the plan for the relocation is not well thought out, is unnecessarily disruptive for the children, and is not in their best interests.
- Arguments in favour of the status quo may be persuasive, particularly if both parents were fully involved with the children and there was, for example, an order for shared or joint care and control.
- As with the arguments in **2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?** the reverse is true in respect of financial motivations for the move and the court may consider that the family would be financially better off, and therefore more stable, if they all remained in Hong Kong.
- The firm views of elder children would be persuasive here too. Teenagers often have firm friendship groups and also are in a crucial stage of their education which may persuade a court to refuse an application for leave.
- If the parent intending to relocate the children has not been facilitative of access to the other parent and is shown to be obstructive of the children's relationship with the other parent, it might be a reason for the court not to allow relocation for fear that the children will permanently be cut off from the left-behind parent.

2.3.8 Costs of an Application for Relocation

- It is always difficult to assess costs in such cases as it will depend on the level of conflict, the number of witnesses, and the length of the hearing. It will also depend on the complexity of the case and whether there are experts called such as child psychologists, and whether it is sufficiently complex to instruct counsel.
- The costs will not be awarded to one party or another in children's cases except in cases of extreme bad behaviour, so both parties should be advised that they will have to bear their own legal costs.
- It is possible to apply for legal aid in Hong Kong.

2.3.9 Time Taken by an Application for Relocation

- The time it takes to resolve an application for leave to remove will depend on the level of agreement and the court timetable, although it usually takes at least six to eight months for the application to be determined, and, in some cases, it may even take a year or more. The courts will endeavour to prioritise children's matters.
- As there is an element of uncertainty in respect of the court timing, delay can be reduced by settlement of the children's matters through mediation and negotiation. With a mediation agreement, a level of detail, which can be provided to the left-behind parent to allay fears in respect of future contact with the children, can be set out in full.
- These cases are notoriously difficult to settle by mediation, because essentially there is a loser, but it can be done, and regularly is, with skilled mediators to assist the parties.

2.3.10 Primary Caregivers Versus Left-Behind Parents

As set out above, the best interest of the minor is the first and paramount consideration after due consideration of the children's views and a social welfare report. Therefore, the important aspects of the case relating to the parents, be they the primary carer or the left-behind parent, will be secondary and part and parcel of the considerations relating to the children's welfare. It cannot be said that the courts are more sympathetic to one parent or the other. Having said that, and as mentioned, if the primary carer is moving back "home", the bar does seem to be lower for those applicants.

2.4 Relocation Within a Jurisdiction

Fortunately for families in Hong Kong, which is relatively small, access is readily achievable within the jurisdiction. There are, of course, disputes regarding access arrangements and sometimes complicated plans must be put in place for the transfer of children from one home to the other. The other factor in Hong Kong is that this is generally greatly facilitated by the common presence of full-time domestic carers who are able to accompany the children from one venue to the other.

3. Child Abduction

3.1 Legality

At present, if there are no proceedings before the court and no prohibition on removal of the child, it is not "illegal" to remove the child from the jurisdiction without consent of the other parent or the court.

Where there are proceedings, leave of the court is required.

The Proposed Children's Proceedings (Parental Responsibility) Bill, referred to in **1.1 Parental Responsibility** and which has yet to be ratified by the Legislative Council of Hong Kong (LegCo), includes a provision which would make giving written consent to remove a child from Hong Kong for more than a month mandatory. It would also be mandatory to obtain express written consent to permanently remove a child from the jurisdiction of Hong Kong.

3.2 Steps Taken to Return Abducted Children

Hague Convention Countries

- Hong Kong is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980 and the Child Abduction and Custody Ordinance Chapter 121 was enacted in 1997 to give effect to the Convention in Hong Kong.
- Therefore, where the child has been removed without consent, to another country which is a signatory, or wrongfully retained in Hong Kong, it is possible to follow the relevant procedure.
- The Secretary for Justice is designated as the Central Authority of Hong Kong (in practice, this is the Department of Justice – DOJ).
- The central authorities will co-operate with each other to secure the prompt return of the child to its place of habitual residence.

Steps to be taken include the following.

- Make an application to the High Court of Hong Kong by originating summons if the child has been wrongly removed or retained in Hong Kong, supported by an affidavit.
- Inform the DOJ of the intention to make an application by filing the International Child Abduction prescribed form.

- The court has the power to make interim orders in addition to an order for return or otherwise.
- There is generally no oral evidence: the aim is to complete the matter within six weeks.

Non-Hague Convention Countries

- Unfortunately, many of the countries with which Hong Kong has a close tie, notably China, Taiwan, and Japan, are not signatories and such cases are more problematic.
- There was a recent case, however, which involved Taiwan, in which the Family Court Judge made it clear that the principles of the Hague Convention would guide the courts in Hong Kong in such cases and it was within the court's jurisdiction to make a return and non-removal order. The court ordered the immediate return of the child unless the abducting father could show that there was a grave risk of psychological harm upon her return to Hong Kong: SWTQ v WE (Injunction; non-removal of child) [2022] HKFC 177.
- As with Hague cases, lawyers in the other jurisdiction would have to be involved in returning the child to Hong Kong.

In other cases, particularly those involving unmarried parents, the inherent jurisdiction of the High Court in Wardship has been invoked to assist in getting the abducted child back to Hong Kong: YJH v LKHM (removal of child; wardship) [2019] HKFLR 418; or returned to Taiwan: C v N (Children; wardship) [2016] HKFLR 125; WMB v EIYL (Wardship; order to return child from Taiwan to Hong Kong) [2024] HKCFI 17733.3.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

As set out in **3.2 Steps Taken to Return Abducted Children**, Hong Kong is a signatory of the 1980 Hague Convention.

Free Legal Advice

- Article 26 of the Convention provides that each central authority (in Hong Kong this is the DOJ, on behalf of the Secretary for Justice) shall bear its own costs in applying the Convention and that it may not require payment from the applicant under the Convention.
- However, Hong Kong has elected that it is not bound by this unless the costs are covered by legal aid. Such aid is available for relevant applications in Hong Kong. In order to qualify for legal aid, the applicant must pass the merit and means tests. In addition, the applicant, even if legal aid is granted, may be required to pay a contribution towards the costs. In short, therefore, free legal advice is hard to come by.
- There is a Bar Association Free Legal Scheme which will provide free legal advice and representation in some cases.
- Certain solicitors' firms may take the case on pro bono.

The DOJ International Child Abduction website provides information on making the applications under the Hague Convention.

There were approximately six Hague cases that were reported in Hong Kong between 2020 and 2023. The result for five out of the six cases were that the child was ordered to return to the child's habitual place of residence. The one case where the Hague application was unsuccessful was because the court found that the asserted habitual residence did not acquire the necessary degree of stability to become habitual.

The Purpose of the Hague Convention

- The principle that the child should be returned promptly to the child's place of habitual residence is upheld in Hong Kong courts.

- The application must be made within a year of the date of removal; if longer than this, the court has a discretion as to whether it is still appropriate to return the child.
- Return may not be ordered if there was no breach of the rights of custody and/or access (where the applicant did not have rights of custody – this can be problematic for unmarried fathers), or if it is found that the applicant had acquiesced to the move.
- Rarely will the defences to the Convention, namely that there is a grave risk that the child's return would expose her/him to physical or psychological harm or otherwise place the child in an intolerable situation under Article 13, be successful. In Re P [2004] 1 HKLRD 815, it was said that a "very high degree of grave risk of personal harm" had to be established. In M v E [2015] HKFLR 337, the Court of Appeal confirmed that the risk had to be "grave" which related to the risk, rather than the harm itself, although "harm" and "risk" are often linked. The harm is either the child's physical or psychological harm, such that the child should not be reasonably expected to tolerate or put up with the situation. The court commented here that as the exception concerned the future return to the child's home country, protective measures should be put in place by the court of that country. It would not include difficulties over accommodation and financial support. Such issues are generally to be dealt with in the other jurisdiction, where a proper removal application should have been made.
- In EW v LP (International Child Abduction) [2013] HKFLR 135, the child was not returned for the reasons that he would be put into an intolerable situation due to his level of anxiety and fragility. Also, the formal application had been delayed for 11 months after removal which suggested the applicant had acquiesced. It was heard a further 17 months before the substantive hearing took place, despite directions from the court to set the matter down, due to delays relating to enquiries from the Slovak Central Authority, interlocutory applications, and finding an appropriate date.

Returning an Abducted Child to a Non-Convention Country

- To return a child to a non-Hague Convention country, the applicant will have to make an application to the court in Hong Kong. As the applicant is normally outside of Hong Kong, applications are generally made to the High Court and often involve wardship in order to ensure that the child cannot leave Hong Kong until the application to return has been dealt with.
- Applications under wardship or to the High Court are made by originating summons.
- It has been held in the family courts that the Hague principles will apply with due modification in an appropriate case: YJH v LKHM [2019] HKCFI 2030 and C v N [2016] [2016] HKFLR 125.
- It was held in YJH that the principles of forum non conveniens were sufficient to deal with that case without resorting to the Convention authorities.
- In C v N the High Court found that it was appropriate to apply the general principles of the Hague Convention with some modifications:
  - (a) The welfare of the child is paramount (Section 3 of the GMO).
  - (b) The court would determine which was the more appropriate forum to decide the substantive issues relating to the child's welfare.
  - (c) Normally the child's best interests were served by having their future determined

in the jurisdiction of their habitual residence.

(d) So long as the country from which the child has come applies the principles acceptable to the Hong Kong courts, subject to the matters to be considered under Article 13 or risk of persecution or discrimination, then the child should be returned to his/her place of habitual residence.

(e) It is for the abducting parent to prove that there is a defence to the child's mandatory return and to justify why the child should stay in Hong Kong.

(f) As with Hague applications, speed is of the essence.

(g) In cases of return, it is normal practice of the courts to insist on undertakings to the court to safeguard the child's welfare on return.

(h) Undertakings should not hamper the freedom of the foreign court and such undertakings should be simple, clear, and easy to implement, and mainly cover the interim period before the foreign court has had a chance to fully address the matter.

(i) The objection of the abducted child can be taken into account if the child is of sufficient age and maturity and is able to give valid reasons for his/her refusal to return to his/her place of habitual residence.

- In the same case, the children were returned to Taiwan and the judge decided to temporarily exercise the wardship jurisdiction to ensure a smooth transition of moving the children from Hong Kong.
- The judge found that the children's undoubted habitual residence was Taiwan, the mother had not demonstrated otherwise, and they had been removed in breach of the father's rights of custody. There was no suggestion of persecution, discrimination, or risk that the mother and children may face in Taiwan.

3.4 Non-Hague Convention Countries

Hong Kong is a Hague Convention country.

Trends and Developments

Contributed by:
Stephen Peaker, Yvonne Kong, Lauren Ng and Gabriel Yuen
Oldham, Li & Nie

Oldham, Li & Nie is a highly regarded Hong Kong-based law firm, whose commitment to professional excellence has been the cornerstone of the firm since its creation in 1987. With many years of experience practising in Hong Kong, the firm's diverse global employees, who embody its East–West culture, are able to deliver an integrated suite of legal and business solutions. The firm currently has over 40 lawyers, admitted in one or more jurisdictions, including Hong Kong, France, the UK, the US, Australia, Canada and Japan. It also has a thriving China practice, carried on from its Hong Kong and Shanghai offices and when necessary with its associate legal network in Mainland China.

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The Impact of the COVID-19 Pandemic on Relocation Cases

Hong Kong has long built its reputation as a global financial hub attracting expats from all over the world. However, the impact of the COVID-19 outbreak for almost three years between 2020 to 2023 has led to many families leaving Hong Kong during some of the most stringent restrictions in the world.

This increase in family relocations and the added dimension of the COVID-19 pandemic has made an already highly contentious and emotionally charged area of family law even more complicated. Hong Kong has battled numerous outbreaks through the years, with the SARS outbreak in 2003, the swine flu pandemic in 2009 and the COVID-19 pandemic in 2020. Experts have warned to expect another pandemic in the future and now that the dust has settled after the COVID-19 outbreak, it will be helpful to look at how the Hong Kong Courts tackled child relocation cases during the COVID-19 pandemic.

Best interest of the child still paramount

The Hong Kong Courts have historically taken guidance from UK case law in determining child relocation cases. In particular, the UK case of Payne v Payne [2001] 2 WLR 1826 as followed in the Hong Kong case of SMM v TWM (Relocation of a Child) [2010] HKFLR 308 is still considered the leading authority in Hong Kong. In Payne v Payne, the UK court held the welfare of the child to be paramount and also listed various factors to be considered including whether the applicant's, usually the mother, proposal was genuine and realistic, whether the father's opposition was genuine and the impact on the mother if relocation was refused. The Court in Payne v Payne recognised that relocation cases were usually brought by a mother seeking to return to her homeland and that refusing the primary carer's reasonable relocation proposals was likely to impact detrimentally on her children's welfare. This has led many to believe that a relocation application by a primary carer would more likely be granted over an application by a non-primary carer.

However, the Court of Appeal in the case of B, A v B, L [2019] HKCA 822 recently restated that, in Hong Kong, the paramount consideration is the best interests of the child and that there was no presumption in favour for a primary carer. Nonetheless, the Court of Appeal also recognised that the Payne factors are still relevant in that they "provide a structured framework in which the appraisal is to be made holistically".

Relocating in the midst of a global pandemic

JTMW v NAV [2020] HKFC 244 was one of the first few relocation cases which had to grapple with the thorny issue of COVID-19 and the last day of trial had to be adjourned from 15 April 2020 to 18 September 2020 due to the COVID-19 pandemic. The father who was working as a pilot, was seeking to relocate their two boys back to his home-country, Denmark, where he would have the support of his family and friends. Pursuant to a prior court order, the father had been granted custody and care and control of the boys. The mother applied to have the father's application dismissed on the basis that the situation was rapidly developing because of the pandemic, the impending restructuring of the father's employer and changes in immigration requirements of Denmark. The judge rejected the mother's application and stated:

"Another reality is that the world is now facing the COVID 19 pandemic. The pandemic is moving, and moving rapidly [on] some... days, but it does not mean that the court should wait until the end of it or when the post-Brexit situation is

clear. What the court should do is to consider the father's application on the facts and materials before it now and come to a decision the best it can."

The father was seeking to relocate as he had obtained approval from his airline to transfer to the London base which would enable him to return to his home country, Denmark, while reporting for duty at Heathrow, London. The older son, who was attending a local secondary school, was also having adjustment problems in school and was subject to bullying. The father was unable to afford changing the older son to an international school due to financial constraints.

One of the objections raised by the mother was that Denmark was a dangerous place to go as it had far more COVID-19 cases than Hong Kong. The judge did not accept this point, noting that:

"Denmark and Hong Kong, and for that matter, the world, have been facing the challenge posed by [the] Covid-19 pandemic. In different countries and at different times there have been waves of surges of cases... Some of the time Hong Kong has met with success and the same can be said for other countries. Things should not be mired in stalemate simply because of the pandemic. I am sure what I have in mind should be the long term best interest of the boys and attention should not be focused on the infection rates alone."

Taking a holistic assessment, the judge ultimately granted the father leave for the children to relocate to Denmark noting that he would obtain support from his family and the situation in Denmark would be better for the children than in Hong Kong.

In LCH v JMC [2021] HKFC 88, the court had to consider the mother's relocation application to Toronto, Canada in the midst of COVID-19. The mother was born in Hong Kong but raised in Toronto. The father, like the applicant father in JTMW v NAV, was also a pilot and had been born and raised in Sydney.

The mother was seeking to relocate because she felt that the living conditions would be far superior in Canada, she and the child would be able to live with her parents in their sizeable family home and she could not afford to live in Hong Kong. The judge considered it to be a very finely balanced case with each party being able to put forward a credible case for the child relocating to Toronto or staying in Hong Kong. As to the living conditions, the judge noted that the mother's present housing choice, ie, to live in a small flat on Hong Kong island, was largely of her own making when she had previously been living in both parties' Lantau home which she sold. The judge noted that she could choose to live elsewhere and potentially enjoy a better standard of living if she moved back to Lantau. On the finances, the judge held that the mother, who was unemployed, had an earning capacity and that, long term, both parties would need to work. The judge also considered that while the mother had grown up in Canada, she was born in Hong Kong and lived here and as such she also had roots in Hong Kong. While the judge recognised that losing the application would be a blow to the mother, the judge held that the child's needs had to take precedence.

The judge also had doubts that the mother's application was genuine and not motivated by a selfish desire to exclude the father from the child's life. There were serious instances of litigation misconduct by both parties and the father had issued a Hague application against

the mother in 2019 after she had taken the child to Toronto without his consent. While the father did not proceed with his Hague application, the mother eventually returned to Hong Kong with the child and she took out the relocation application shortly thereafter.

Taking into account all the factors, the judge held that it was not in the child's best interest to relocate to Canada, noting that the child had a close relationship with her father which would be significantly undermined if she were to relocate. The impact of COVID-19 was also considered in light of the father's ability to visit the child in Toronto with the judge stating as follows:

"The biggest difficulty in this case is that the proposed relocation cannot be tempered by frequent access. Toronto is a long way away from Hong Kong and C is only 5 years old. Although the father is a pilot he will not be able to travel to Toronto frequently to see C. Historically his job did not generally take him to Toronto and even if that changes he would not currently be able to see C because of the existing Covid restrictions. Even once those restrictions lift he will still not be able to see C for very long, if he is travelling to Toronto for work. To ask him to frequently undertake travel of this magnitude on his days off would be very difficult. He has said that as he is relatively junior it is unlikely that he would be able to take his annual leave during the school holidays and that this has not happened to date."

It was clear that regardless of the impact of COVID-19, the father would have had limited ability to travel to Toronto frequently for access with the child and the judge was alive to the fact that given the child's tender age and in a situation where both parents were actively involved in the child caring, the effect of the child losing her close relationship with her father would have considerable effect on her.

By contrast in A v B [2022] HKFC 203, the mother's application to relocate the child to Sydney, Australia was rejected. The basis of the mother's application was that the child was not coping with the demands of her present school and that the school she had identified in Sydney would be a much better fit for her. The mother also wished for the child to create a stronger bond with her maternal family who were living in Sydney. However, by the time of trial, the mother's case had shifted such that she accepted that the child was an able student and that the child's education at her present school was acceptable. As such, the judge considered that the main basis of her application "was consequently swept under the carpet". The judge held that it was premature to allow the relocation and that there was no particularly pressing reason for the relocation to take place immediately, the child was still young, there was no reason from an educational perspective why she had to relocate quickly and there were no financial constraints nor was there a job or partner "in the wings" for the mother in Sydney. Furthermore, the judge considered that the detriment to the child losing her relationship with her father, whom she had a good relationship with, was not in her best interest and that "any disruption to the current status quo should be approached cautiously". The judge was particularly concerned that the father's relationship with the child could be severely undermined if the relocation was allowed especially if travel continued to be problematic as a result of COVID-19. The judge held that it could not simply ignore the impact of COVID-19 and that a potential relocation should be revisited once travel bans were no longer a global concern.

By the time the court heard the case I, M also known as K, M and I, SM [2023] HKFC 66, the COVID-19 outbreak was nearing its end in Hong Kong. The trial was heard in November 2022, shortly after the government lifted compulsory quarantine requirements for inbound travellers in late September 2022. The mother was seeking to return home to Japan with the children where she would have the support of her family, and living in Hong Kong was financially unsustainable for the family. The mother, in particular, had been impacted as she was employed by an airline company but, due to COVID-19 and a recent injury, her income had drastically dropped and her pension had been frozen.

The father objected on the basis that (i) the mother's motivation of her application was to exclude him from having an active role in the children's lives; (ii) he had sufficient financial resources to maintain the mother and the children in Hong Kong; and (iii) his relationship with the children needed to be healed.

In granting the mother's application, the judge found that the whole financial position put forward by the father was "completely untenable and unsustainable" and the application was genuinely motivated given the mother's history in facilitating and encouraging access. In particular, the judge held that the court was not ready to put the children's lives on hold in order to give time for the father to "repair" his relationship with the children, especially given that it was difficult to assess when the relationship could be considered repaired or when access can be said to have resumed to "normal". The judge considered that "uncertainty could not possibly be in [the children's] best interests".

The way forward

A review of the relocation cases heard during the COVID-19 pandemic shows that the welfare of the child remains the primary concern of the courts. The courts are not keen to put children's lives on hold when it is in their best interests to relocate. In the cases where relocation was refused, such as LCH v JMC and A v B, this was due to the inherent issues in the application itself rather than as a result of COVID-19. From the above four cases heard during the COVID-19 pandemic (which are not conclusive cases but are reported relocation cases), the court has clearly set out why two of the applications were granted whereas the other two were not. Where a parent brings a relocation application that is genuine, practical and well thought out, the courts have shown that they will not accept the pandemic as a basis to delay or reject the relocation.

ITALY

Law and Practice

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Studio Zanetti Vitali was founded by Professor Emidia Zanetti Vitali in 1997 and is a boutique firm located in Milan with six independent lawyers providing high-end national and international clients with individually tailored advice and assistance on all aspects of civil law involving private (ie, non-commercial) parties. Studio Zanetti Vitali's main fields of experience are litigation before all Italian courts and non-contentious dispute resolution concerning primarily – but not exclusively – legal separation, divorce, child custody, inheritance, paternity and guardianship. Studio Zanetti Vitali lawyers also have significant experience in coordinating international legal teams following trans-border disputes and settlements concerning family and inheritance issues.

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STUDIO EMIDIA ZANETTI VITALI
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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

The Italian notion of *responsabilità genitoriale* appears very similar to the English notion of "parental responsibility". Until 2014, the decision-making capacity, and duty, of parents in Italy was referred to as *potestà dei genitori,* according to a tradition going back to the patria potestas of Roman law, and, apart from its renaming, the terms and provisions have varied little since the general reform of family law dating back to 1975.

According to Article 316 of the Italian Civil Code, parental responsibility belongs to both parents jointly, and must be exercised by mutual agreement, in pursuance of the best interests of a child, taking into account the child's personal inclinations and abilities, particularly, but not exclusively, with regard to their preferred habitual residence, and to all decisions concerning education and upbringing.

If parents cannot reach an agreement on any issue of specific importance to their child, either of them can ask a judge to intervene. However, before making any decision, the judge must hear each parent, and the child if the child is 12 years old or older – or under 12 if considered mature enough to have a say – and must then endeavour to steer all parties towards a satisfactory solution.

Concerning financial matters, according to Article 320 of the Italian civil code, every decision related to the child's estate, or property, outside the bounds of ordinary administration must be specifically authorised by the judge, and whenever a conflict of interest arises between the child and those to whom parental responsibility to the child falls with regard to a specific decision, the court will appoint an ad hoc guardian (*curatore speciale*).

Finally, according to Article 321 of the Italian Civil Code, an ad hoc guardian can also be appointed if the parents are not willing or able to take the specific action which appears to be required to meet the best interests of the child.

1.2 Requirements for Birth Mothers

Based on Articles 250 and 254 of the Italian Civil Code, to be granted parental responsibility, a birth mother must recognise *(riconoscimento*) their child. This can be done upon the child's birth while its birth certificate (*atto di nascita*) is being prepared, or by means of a simple declaration to the citizens' registrar (*ufficiale di stato civile*) following the child's birth – or even before, once the child has been conceived.

A child can be also recognised later by a public deed made by a notary (*atto pubblico*), or even in a will. However, according to Articles 256 and 257 of the Civil Code, in all cases, such acknowledgment is irrevocable and not subject to restriction.

The only conditions to a mother's right to acknowledge parentage of a child are that the mother must have reached the minimum age of sixteen (if this is not the case, the child can be recognised anyway if the minor parent obtains authorisation by the judge), and that the child must not have been conceived by way of an incestuous relationship (however, according to Article 251 of the Civil Code, if the acknowledgement is deemed to be in the best interests of the child, it could be authorised by the judge even in this case).

1.3 Requirements for Fathers

The rules that apply to the acknowledgment of a child by the mother apply also to the acknowledgment of parentage by the father if the parents are not married (in this case, see **1.5 Relevance of Marriage at Point of Conception or Birth**). However, according to Article 250 of the Italian Civil Code, if the child is not recognised jointly by the parents, the acknowledgment by the second parent (who, almost without exception, will be the father) is subject to the agreement of the parent who has already recognised the child (almost invariably the mother).

However, the consent to the acknowledgement by the mother cannot be withheld if its refusal is not deemed to be in the best interests of the child; in this case, the parent who wishes to acknowledge a child already recognised by the other parent can ask the judge to authorise the acknowledgment by court order.This order can also be applied with respect to child's last name, custody, visiting rights and financial support of the child.

In all cases, acknowledgment of a child who is at least fourteen years old cannot be made without that child's consent.

1.4 Requirements for Non-genetic Parents

Italian law provides that adoption is the only way to be granted parental responsibility for a non-biological child (see **1.7 Adoption**).

However, people other than a child's parents can be granted custody *(affidamento*) without acquiring parental responsibility when the child's biological parents are deemed unfit to exercise parental responsibility but the situation is not serious enough to justify a full adoption. In this case, the court will put in place measures targeted at monitoring the situation, possibly by the appointment of social workers.

1.5 Relevance of Marriage at Point of Conception or Birth

Since 2014, all residual differences between the children of married or non-married couples have been removed (one of these being, for example, that children of married couples were referred to as "legitimate" children, and those of non-married children were referred to as "natural" children).

However, according to the presumption of paternity (*presunzione di paternità*) set out by Article 231 of the Italian Civil Code, parental responsibility for the child of a married couple belongs, automatically, to the husband of the child's mother, without any need for acknowledgement of the child being conceived or born during the marriage.

According to Article 232 of the Civil Code, presumption of paternity applies when a child is born between the date of the parents' wedding and three hundred days after the annulment of their marriage or their divorce, or the first appearance of the parties before the judge in legal separation proceedings.

1.6 Same-Sex Relationships

While Italian Law No 76 of 20 May 2016 on same-sex unions does not specifically allow for any kind of adoption, and, in Italy, any kind of heterologous medically assisted procreation is forbidden, according to a June 2016 decision (Cass., 22 giugno 2016, No 12962), the Italian Supreme Court (*Corte Suprema di Cassazione*) confirmed that, at least in principle, and if this is deemed to be in the best interests of the child, a step-child adoption (*adozione in casi particolari* – see **1.7 Adoption**) can take place within the

context of a same-sex relationship (*unione civile fra coppie dello stesso sesso*).

1.7 Adoption

In Italy, there are two main types of adoption: legitimating (*adozione legittimante*), where a child assumes the same position in a family as a biological child, such as in national and international adoption; and non-legitimating adoption (*adozione non legittimante*), which has more limited effects. All facets of adoption are subject to the provisions of the Law No 184 of 4 May 1983.

While, for both legitimating and non-legitimating adoption, the adoptive parents are granted full parental responsibility for the child, the main difference between both types of adoption is that the latter does not remove the existing filial ties with the members of the child's biological family.

National adoption (Articles 6-28 of Law No 184 of 4 May 1983) is only open to married couples living together continually for at least three years and thus able to guarantee that the adoptee can rely on the stability of their relationship. The age of the adoptive parents must usually be between 18 and 45 years more than that of the child. It is possible to adopt several children, preferably siblings.

In order to be subject to adoption, a child must be declared adoptable by the Tribunale per i Minorenni based on a declaration of adoptability (*dichiarazione diadottabilità*) issued by a juvenile court in a specific order – such as at the end of court proceedings to establish a state of enduring abandonment (eg, if the child is already in foster care, provided that this situation has not been forced on the parents by exceptional circumstances).

A second procedure then takes place, again before the juvenile court, upon the request of the would-be adoptive parents. Their fitness as parents is ascertained, usually with the involvement of social workers after a period of pre-adoptive custody lasting one year (extendable to two) and a final verification that the adoption is in the best interests of the child and that all conditions required by the law have been fulfilled. Children of 12, or considered mature enough to have a say if younger, must agree to be adopted.

International adoption is governed by Articles 29-43 of Law No 184 of 4 May 1983 and concerns the adoption by couples resident in Italy of foreign children declared adoptable in their country of origin. The adoption must take place in accordance with the principles set by the Hague Convention of 29 May 1993. The process is open to couples who, upon request, have been declared fit to adopt by the juvenile court, and it takes place following complex proceedings held in cooperation with specifically authorised organisations. International adoption has the same effect as national adoption.

According to Articles 44-57 of Law No 184 of 4 May 1983, non-legitimating adoption is referred to as "adoption in specific situations" (*adozione in casi particolari*), and it allows for the adoption of a child who has not been declared to be in state of enduring abandonment in the following four cases:

- when the child is orphaned by two parents and has been in the custody of relatives or a person to whom they have a stable, long-term relationship;
- when one spouse wishes to adopt the biological or adoptive child of the other;
- when the child has a physical or mental impairment; and

• when pre-adoptive custody is not possible.

This kind of adoption requires the agreement of any child older than fourteen and of their biological parents and their spouse (in Italy it is possible for a minor to enter into a marriage, provided that the minor is at least sixteen years' old and has been authorised by the court), but, if consent is refused without justification, the juvenile court can order the adoption (this cannot happen if the biological parents refusing consent for the adoption still exercise parental responsibility on the would-be adoptee, or if the consent is refused by the spouse of the adoptee, provided that the couple lives together).

"Adozione in casi particolari" is subject to revocation in certain very specific cases.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

In accordance with Article 316 of the Italian Civil Code, as with any decision of importance affecting a child, relocation to another country requires the agreement of both parents, even if the child is in the sole custody of one parent.

2.2 Relocation Without Full Consent

Without the required parental consent, a child's relocation has to be authorised by the court *(Tribunale*).

If the child's parents are co-habiting, proceedings for applying for the relocation must be held in simplified form according to Article 473 bis.38 of the Italian Code of Civil Procedure which applies to all disputes concerning decisions regarding children of non-legally separated or divorced couples. However, if, after the filing of the petition, one of the parties applies for a full legal separation or custody judgment, the case should be dealt with within this new context, and only urgent and temporary measures will be looked at on a more simplified basis.

If the issue of relocation arises when proceedings for legal separation, divorce or custody of a child born of non-married parents are already pending, the relevant measures will fall within the competence of the same judge of those proceedings and will be treated within the scope of these, possibly by means of a provisional order, according to Article 473 bis.23 of the Italian Code of Civil Procedure.

If the parents disagreeing on relocation are already legally separated or divorced or, since they are not married, a final order concerning custody of their child has already been issued, proceedings concerning relocation will have the purpose of modifying orders concerning children already in place, and should take the same form as legal separation, divorce and custody proceedings, according to Article 473 bis.47 of the Italian Code of Civil Procedure.

In all cases, the judge must hear any child of at least 12 years' old, or, if younger, deemed mature enough to have a say, as already stated in **1.1 Parental Responsibility** and, according to Article 473 bis.8 of the Italian Code of Civil Procedure, may appoint a guardian ad litem (*curatore speciale*, or lawyer, not to be confused with the *curatore speciale* of Article 321 of the Italian Civil Code – see **1.1 Parental Responsibility**). A lawyer such as this is appointed in almost every serious case, but in particular when parents appear unable to fairly represent their child in court, or whenever a child of 14 or older asks a judge to represent them. After their appointment, this person will act as the attorney of the

child (who therefore becomes to all effects party to the judgment) and may also be given by the court the power to represent the child outside the context of the pending proceedings, to carry out certain acts such as those required to fulfil the child's best interests.

Once the appropriate proceedings have been followed, in order to assess whether the move is compatible with the child's best interests, according to article 473 bis.25 of Italian Code of Civil Procedure the judge may appoint a court expert (*consulente tecnico di ufficio*) who will usually be required to provide, in writing, a full evaluation of the situation of the family and set out the measures which, according to the expert's opinion, are most likely to ensure the that the child's needs are fulfilled (this includes visiting rights, if applicable). Each party will have the right to appoint their own expert (*consulente tecnico di parte*) to assist the court expert.

According to Article 473 bis.27 of the Code of Civil Procedure, the judge can also order the intervention of social services to evaluate the family situation and provide the court with a written report. The effectiveness and timeliness of social workers' interventions are subject to broad variations, depending on where in Italy proceedings take place. While evaluating a case, social workers may avail themselves of the help of psychologists, who can be privately hired, in agreement with the parties, or, if no agreement is reached, can be employees of the same public agency to which the social workers belong or of other public organisations.

All decisions on relocation, regardless of their permanent or temporary nature, will be subject to appeal (or opposition, if rendered between parents still co-habiting), but will usually be immediately effective, even if challenged.

If no agreement is reached on arrangements regarding visiting rights and maintenance obligations, any judicial decision concerning relocation will settle issues and may contain provisions concerning travel expenses and the duty of each parent to accompany their child or to provide necessary travel arrangements.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

Article 16 of the Constitution of Italy provides that every Italian citizen has the right to move abroad. When a conflict arises between two parents who are both fit to exercise responsibility over the decision concerning the relocation of a child, the court will generally be called upon to decide which of the parents will retain the child in question.

This means that, even if relocation is deemed to be problematic for the child, it may be authorised anyway if the best interests of the child dictate, above all other concerns, the preservation of their ties with the parent that is relocating or if the parent left behind is not able to fully meet the child's needs.

However, various other options might also be possible if they serve the child's best interests, even if they mean granting custody to parties (private or public) other than the parents, although this applies only in extreme cases.

In all cases, while deciding on a relocation issue, in order to evaluate whether a move is in the best interests of the child, the court will try to make a balanced assessment of factors that include the following:

- the likely consequences of the move on meeting the basic needs of the child (eg, whether the environment of the country of destination is safe and healthy; whether housing needs are met; whether any special medical care needs of the child can be fully met after the move; whether the education of the child will be compromised by a move, etc);
- the likely ability of the child to maintain a satisfying relationship with the parent and relatives left behind;
- the ability of the parents to generate sufficient income to meet the expenses required to support the child both before and after the move;
- the child's likely ability to adapt to their new situation following relocation (which can be influenced by factors such as their ability to understand and speak the language of the country of destination; the compatibility of the school system of the destination country with the system of the country of origin; the existence of a network of familial or social relationships already in place in the destination country or the likely ability of the child to build new relationships upon arrival; the ability of the child to pursue, in the country of destination, sports, cultural activities and other hobbies which they enjoyed in their country of origin);
- the likely negative consequences of the removal of the child from their habitual environment of a possible loss of social and familial relationships already established in the country of origin; and
- new positive opportunities which could be available to the child after the move.

2.3.2 Wishes and Feelings of the Child

As indicated in **1.1 Parental Responsibility**, before issuing an order on anything as major as a relocation, a judge must hear directly any children aged 12 years or younger if they are considered mature enough to have a say in the matter. The weight given to their opinion will be proportional to their maturity and to the seriousness of the motives on which their opinion appears to be grounded.

2.3.3 Age/Maturity of the Child

The wishes and feelings of the child will be taken into consideration if the child is considered old enough. It is very unlikely that a judicial decision on relocation would go against the clearly expressed wishes of a child approaching adulthood, which in Italy is age eighteen.

2.3.4 Importance of Keeping Children Together

Even in very specific cases, for example, when a relationship among siblings is seriously compromised, or when the behaviour of one is a threat to the others, this principle can be subject to exceptions, and in evaluating an application to relocate, the Italian court will attach paramount importance to the need to keep siblings together.

2.3.5 Loss of Contact

The principle according to which all children have the right to full access to both of their parents (*principio di bigenitorialità*) is one of the pillars of the Italian family law system, and the risk of compromising the relationship between children and parents left behind in a relocation is one of the main obstacles which must be overcome when obtaining the authorisation to relocate from the Italian court.

However, this risk can be mitigated if the visiting rights of the non-relocating parent can be structured in such a way as to limit loss of contact, for example by granting this parent the right to have the child with them during most weekends and holidays. This would clearly be more straightfor-

ward if the country of destination in the relocation is not too difficult to reach.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

There are no specific reasons for relocation towards which Italian courts are more sympathetic, although it is very helpful if the applicant can convince the judge that a move will not significantly unsettle the child's usual routines, with the following scenarios being very favourable:

- the relocation will not negatively affect the contact between the child and parent left behind;
- the child is already fluent in the language of the destination country;
- the child, while still in the country of origin, was already enrolled in a "foreign" school adopting the curriculum of the country of destination, or, upon arrival, will be enrolled in a school following the "domestic" system;
- the material conditions of life of the child will likely improve after the move;
- upon arrival in the country of destination, the child will retain good access to social and family networks already in place (as would happen in a moving-back scenario); and
- broadly speaking, the move reasonably appears to be the best solution to current challenging issues that cannot be resolved if the child was to remain in the country of origin.

Furthermore, any application to relocate abroad will be viewed by the Italian court much more favourably if it is justified for serious and rational reasons, such as the need for access to special medical care unavailable in the country of origin, or the need to follow promising career opportunities. On the other hand, applications to move on whim will not be approved, unless every possible opposition to such a move can be convincingly challenged.

2.3.7 Grounds for Opposition to Relocation

An application to relocate can be opposed if it goes against the best interests of the child. While, as already stated, all cases are different, typical reasons on which an opposition to a move abroad can be based include the following:

- the living conditions in the country of destination will be dangerous due to political instability or widespread social or economic problems, or the legal system in the country of destination does not guarantee the protection of the rights of the child or the parent back in the country of origin;
- the child is likely to face serious problems adapting to their new environment – eg, they cannot understand or speak the language of the country of destination, or the new school system is very different to the previous system;
- the move will prevent the child from maintaining a meaningful relationship with parent left behind or will loosen or even sever ties with their habitual social and familial environment;
- the emotional and financial costs of the child relocating with will difficult for the parent left behind; or
- the move abroad will disrupt the habits and life of the child to such a degree that the reasons for opposing a move outnumber those in favour of relocating.

2.3.8 Costs of an Application for Relocation

The cost of applying to relocate includes legal fees and, possibly, the cost of hiring experts if the court wishes to appoint an expert adviser (*consulente tecnico di ufficio*) and fees are very difficult to assess in advance as they can be

freely agreed between the client and the attorney. However, while actual expenses can vary from between a few thousand euros in very simple cases and several tens of thousands of euros or more, the client can request an estimate of costs that might be incurred (*preventivo*).

A major factor affecting the cost of an application to relocate may be referred to as "procedural independence", meaning that, if, on the one hand, an application to relocate is made within the context of already pending proceedings for legal separation, divorce or custody, the related costs will be diluted within the costs of the main judgment. The related costs can be minimal if the family situation has already been thoroughly evaluated. If, on the on the other hand, the same application is submitted to the court autonomously (ie, by starting proceedings directed only at obtaining an authorisation to relocate), its costs could be equal to or even exceed the costs of a "full" legal separation or divorce or custody judgement.

Finally, even if an application is successful, it should be not taken for granted that the court will require the unsuccessful party to pay the costs (this tends only to be the case when a relocation is opposed on that grounds that it is not for serious enough reasons) and, even in this case, it is very unlikely that the reimbursement will cover the entirety of the legal fees paid by successful party.

2.3.9 Time Taken by an Application for Relocation

The time required to complete an application for relocation can vary from several weeks to a few months if the application is filed according to the simplified rules on the resolution of disagreements between parents who are still living together, or if it is filed within the context of a "full" legal separation, divorce, or custody proceedings that are already pending.

However, reaching a decision concerning relocation could require between many months and one or two years if the petition is filed in the form of an autonomous legal separation, divorce or custody judgment or in the form of a judgement aimed at modifying orders already in place between parents who have ceased living together officially. These timescales apply only to the first degree of the judgment.

According to Article 473 bis.15 of the Italian Code of Civil Procedure, the court can authorise the move by issuing a provisional order, which, at least in theory, and exceptionally, can be granted very quickly, and even in the absence of the other party, if proof is provided that any postponement would irreparably compromise the best interests of the child.

2.3.10 Primary Caregivers Versus Left-Behind Parents

Italian courts treat relocation cases without any prejudice in favour of either party, but are very aware of the need to guarantee that children conserve meaningful contacts with either parent.

2.4 Relocation Within a Jurisdiction

As stated in **1.1 Parental Responsibility**, according to Italian law, all decisions concerning the place of dwelling and the relocation of a child fall within the scope of issues of major importance, and are therefore subject to the same serious treatment regardless of whether a move is domestic or international.

An internal relocation can, in fact, give rise to far more problems than an international one. For example, from a North Italian perspective, a "domestic" move to some remote location in

southern Italy not within easy reach of an airport or a high-speed train station can have more radical consequences on contact between a child and the parent left behind than a move to a European capital city or, for example, to Switzerland.

It is important to note that any move within Italy that is carried out illegally can be subject to less effective remedies than an international abduction because the Hague Convention (see **3.2 Steps Taken to Return Abducted Children**) will not apply. Consequently, any measures aimed at protecting the rights of the parent left behind would simply be dealt with internally, and handled much more slowly than the judgments dealt with on the fast-track basis reserved for Hague Convention return applications in particular, and for international cases in general.

3. Child Abduction

3.1 Legality

Taking a child out of the Italian jurisdiction without the relevant consent referred to in section **2. Relocation** is illegal, and may constitute a criminal offence under Article 574bis of the Italian Penal Code.

3.2 Steps Taken to Return Abducted Children

Italy is a signatory of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Consequently, if a child is abducted from Italy to another signatory country, it is possible to submit to the Italian Central Authority (the Dipartimento per la Giustizia minorile e di comunità del Ministero della Giustizia – Ufficio II – Autorità centrali convenzionali) an application for the return of the child according to its provisions.

Furthermore, provided that Italy is a European Union member State, if the child is abducted to another EU country, the implementation of the provisions of the Hague Convention will be strengthened by the additional rules set out in Articles 23-29 of Council regulation (EU) 2019/1111 of 25 June 2019 "on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction".

These rules are aimed at a further acceleration of the treatment of a return application, and at ensuring that the courts of the member state where the child was habitually resident and from which the child has been illegally abducted retain their international competence on matters regarding parental responsibility (which also cover decisions concerning habitual residence), notwithstanding the denial of a return application, whenever the related decision is grounded solely on the reasons set out in Article 13 of the Hague Convention (ie, when the child is found to have been abducted from the country where they were habitually resident but the parent left behind was not actually exercising custody rights, or when a return would expose the child to serious risk).

This means that, according to the EU Regulation system, the final decision concerning the return of the child is taken by the judicial authority of the country from which the child has been abducted, because, even if the authorities of the country of destination were to deny the return application made under the provisions of the Hague Convention, a subsequent order of return issued by the courts of the country of origin, which retain their jurisdiction, would be fully enforceable.

If, conversely, the child has been taken to a country which is not a signatory of the Hague Convention, lacking any bilateral agreement, the only effective way to pursue their return would be to obtain an order to that effect from the authorities of the same country.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

As stated, Italy is a signatory of the Hague Convention and, therefore, if an abducted child is taken within its jurisdiction, the provisions concerning their return will be fully applied.

The intervention of the Italian Central Authority is free of charge, and judicial proceedings related to an application for the return of a child do not require the active participation of the applicant, who, therefore, is not obliged to instruct a lawyer. However, any legal assistance (which is not essential but may be strongly recommended) should be paid according to the terms agreed between client and attorney.

Furthermore, in several Hague Convention signatory countries, in order to apply for the return of a child it may be necessary to appoint a lawyer who must be paid according to the rules in place in the same country. Official data concerning numbers of Hague Convention cases processed in Italy can be found on the website of the Italian Ministry of Justice at the following link.

While official data does not contain information on the outcome of Hague Convention applications for return processed by the Italian authorities, the treatment of the related proceedings within the Italian jurisdiction is mostly unbiased and respectful of the principles underlying the Convention, with fairness shown to the positions of the parties applying for immediate return as well as to the parties opposing the application, with the best interests of the children involved generally the only factor considered.

According to Article 7 of Law No 64 of 15 January 1994 implementing the Hague Convention provisions within Italian Jurisdiction, applications for the return of children abducted to Italy must be treated as follows.

- Any request for the return of the child from abroad is processed by the Italian Central Authority, which will usually entrust an office of the police specialised in treating juvenile cases with an initial assessment of the situation. This generally entails summoning the parent who has the child in order: (a) to confirm the presence of the latter; (b) to see if the former is willing to spontaneously return the child; and (c), if this is not the case, to gather any additional information.
- If the abducting parent does not agree to return the child to their country of habitual residence, an application must immediately be transmitted to the public prosecutor's office attached to the relevant juvenile court (*pubblico ministero presso il tribunale per i minorenni*) in the place where the child has been abducted (in Italy, there are 26 court-of-appeal districts, each also being the seat of a juvenile court).
- The public prosecutor will immediately submit to the juvenile court an urgent request (*ricorso urgente*) for an order of return of the child, opening proceedings to this effect, and the president of the court will issue an order setting the day of the hearing and the deadlines for the filing of the written defence of the parent who has the child.
- While the "essential" parties in the proceedings are the public prosecutor and the parent opposing the application, who must be heard regardless (as must the child if aged

12 at least, or considered mature enough to express an opinion if younger), the applicant parent will be informed about the hearing by the Central Authority and has the right to appear in court and take a position in the proceedings at their own expense.
- The proceedings should be carried out expeditiously as possible, without any formalities, and will usually end with a final order after a single exchange of written defences and one hearing. While the court can examine any proof submitted by the parties and order any fact-finding as it sees fit (including hearing witnesses and appointing court experts), such related activities will be limited to only what appears to be strictly necessary, or may be rejected altogether in favour of speed (for example, while uncommon, the imposed deadline for written statement of a few days, or even 24 hours, is not unheard of).
- The final order by the juvenile court is subject to a limited type of appeal (*ricorso per cassazione*) before the Corte di Cassazione, or Italian Supreme Court, which can only revoke or modify the order if it has been issued without complying to specific law provisions, being barred from any new assessment of the facts. Furthermore, the order or first degree will usually not be stayed if appealed.
- The deadline set by law requiring the final order to be issued by the juvenile court within 30 days of the date upon which the application for the return of the child was submitted to the Central Authority is not realistic, and the actual average timescale of the first degree of proceedings for return can vary between a few months to a year. Second-degree proceedings before the Corte di Cassazione will take much longer, but, as stated, with no stay of the first order (which is highly unlikely), this will have a limited impact on the outcome of the return application if it has been successful in the first degree of the judgment.

3.4 Non-Hague Convention Countries

Italy is a signatory of the Hague Convention.

Trends and Developments

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Studio Zanetti Vitali was founded by Professor Emidia Zanetti Vitali in 1997 and is a boutique firm located in Milan with six independent lawyers providing high-end national and international clients with individually tailored advice and assistance on all aspects of civil law involving private (ie, non-commercial) parties. Studio Zanetti Vitali's main fields of experience are litigation before all Italian courts and non-contentious dispute resolution concerning primarily – but not exclusively – legal separation, divorce, child custody, inheritance, paternity and guardianship. Studio Zanetti Vitali lawyers also have significant experience in coordinating international legal teams following trans-border disputes and settlements concerning family and inheritance issues.

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Recent Trends Affecting Child Relocation in Italy

The most significant developments affecting the relocation of children in Italy can be summarised as follows.

- The Italian courts are focusing on treating parents as equals in matters relating to children.
- More importance is given to listening to children in potential relocation situations.
- The recent reform of civil procedures ("riforma Cartabia") has radically changed – and not necessarily for the better – the way civil proceedings are handled, and introduced a new, standard process applicable for cases involving matrimonial and parental responsibility judgments.

These three developments affect not only instances of child relocation, but almost all cases involving responsibility for children, and they are hugely significant when handling disputes over an international move involving a child.

Granting parity between parents

Joint custody (*affidamento condiviso*) has been a standard requirement in Italy since Law No 54 of 8 February 2006 made sole custody (*affidamento esclusivo*) an exceptional option, viable only when joint custody is impossible.

In the first years after the above change, the provision concerning joint custody was implemented mostly formally, because, on the one hand, even when the custody was given to one parent only, all the most important decisions (*decisioni di maggiore importanza*) concerning a child (eg, school enrollment, sports, etc) and all consent (such as that required to apply for ID documents, or to travel abroad) required the agreement of both parents.

On the other hand, in cases of joint custody, it was customary for the habitual residence of the child (*collocazione abitativa prevalente*) to remain with one of the parents (usually, but not necessarily, the mother) who acted as the primary caregiver, while the other parent spent every other week end with the child, and possibly one or two additional nights per week, and also part of the portion of the school holidays.

The prevalence of joint-custody arrangements meant that, when the parent with whom the child was placed (*genitore collocatario*) and who acted as the principal caregiver, decided to relocate with the child, it was very difficult for the other parent to prevent the court from authorising the move. This is because the alternative, which was placing the child with the other parent, implied a change of the principal caregiver, and, consequently, was seen as potentially more damaging to the child than a relocation. In many cases, a relocation simply led to a limited rearrangement of the visiting rights of the parent left behind, who, for example, might be granted the right to spend a larger share of weekends or holidays with the child.

In recent years, however, the approach of Italian courts to joint custody has changed dramatically. The idea that one parent should act as a principal caregiver has been put aside in favour of the idea that children have the right to spend an equal share of their life with either parent according to a set calendar, granting each parent more or less equal amounts of time – even if this might deprive the child of a true family "home", forcing them to deal with the logistical issues of constantly being on the move with school books and other material and equipment from one parent's home to the next.

It goes without saying that this new approach to child custody and placement also has major consequences on disputes concerning child relocation. While, in the past, denying an application to relocate filed by the main caregiver meant risking upsetting a situation in which the roles of the parents were clearly determined and, therefore, in many cases, was not a viable option, in the new situation, where each parent has equal rights, an order authorising a relocation, either domestic or international, must be assessed only on the best interests of the child involved, since there are no major problems to work out around how a child will preserve a good relationship with one of the parents. The new emphasis on parity of the parents has potentially made it much more difficult to obtain authorisation to relocate without the consent of the other party, particularly when the reasons for the move do not really serve the child's interests but are more for the personal pursuits, however legitimate, of the parent wishing to move.

Listening to the children

Hearing children in Italian civil proceedings has been mandatory for a long time according to several provisions of law (including the general rules of Articles 315bis of the Italian Civil Code, and 337octies, concerning custody and visiting rights, which also applies to cases of disputed relocation) introduced into the Italian system for alignment with the principles of the New York Convention on the Rights of the Child of 20 November 1989.

The above-mentioned provisions, however, were subject to one exception that allowed judges to entirely dispense with a hearing whenever they deemed that it would not be in the best interests of a child, or that it would be redundant; the problem was that this "exception" ended up being treated as the rule and that, in practice, children were heard in court very rarely – and generally very reluctantly.

All this changed in 2022 following legislative Act 206 of 26 November 2021 which made it obligatory to appoint a guardian ad litem (*curatore speciale*) who would act as an attorney for a child and become an independent party for almost all disputed cases impacting on custody and visiting rights, such as those concerning relocations.

According to the new text of Article 78 of the Italian Code of Civil Procedure (now Article 473 bis.8, following the full implementation of the reform), a guardian must be appointed not only in cases of forfeiture of parental responsibility, or adoption, or when the parents appear unable to represent the best interests of the child, but, also, whenever a child of 14 years of age so demands, and whenever the judge deems the parents to be temporarily unable to represent the child, which, according to interpretation given to the relevant provision by many courts, will be the case whenever the parents disagree on a major issue such an international relocation.

The consequences of the new relevance given by the reform of Italian civil procedures to the personal position of a child underscores the existence of a trend towards a real focus on only the interests of children in any judicial decision concerning a relocation. However, while it can be said that adding an independent guardian can allow a more objective evaluation of the position of the child, introducing a third party could add a new layer of complexity and further uncertainty for parents.

Impact of the Cartabia Reform

The new development with the most meaningful impact on parental equality and responsibility and affecting child-relocation matters is the "leg-

ge Cartabia", the reform of civil procedures, or the Cartabia Reform, implemented from March 2023.

Among the many indisputed benefits of the reform, it is fairly difficult to identify any simplifications to solutions that it provides to disputes concerning matters of child relocation. Previously, when no agreement between parents could be reached, many courts were able to handle the issue with simple procedures, which is no longer the case.

Before the Cartabia reform, there was no general procedure in Italy for family cases, and judgments falling outside the procedure of legal separation and divorce cases, such as judgments concerning parental responsibility for children of unmarried couples, were treated as judgments held within the chamber of council, meaning trials in closed session – which were very simplified judgments, regulated by a single law provision, Article 738 of Italy's Code of Civil Procedure, according to which the panel of the court, before any decision, had the authority to gather information (*assumereinformazioni*). This meant that, in cases related to children, the court could issue orders over fact-finding activities as it saw fit, ranging from none at all (which meant that a decision could be reached in a few weeks) to appointing experts, hearing witnesses and anything else (which meant that proceedings could span years).

However legal separation, divorce, and all other proceedings shared one common feature, which was that, after a single exchange of written defences – an initial application and a response, which required only the attachment of basic documentation, such as tax statements and public registry certificates – the parties appeared before a judge (or a panel, depending on the nature of the case) empowered to issue provisional orders. In most cases, this judge was able to broker an agreed solution and could immediately grant temporary measures which allowed the parties to manage at least the more urgent issues related to relocation (eg, accepting employment offers; finalising house rentals or purchases and making arrangements concerning school enrolments or health insurance).

Conversely, under the new Cartabia procedure, in order to speed up the proceedings after the active intervention of the judge, almost all the weight of the process related to the defence of the parties is now allocated to the initial phase of the judgment: this means that, before appearing in court for the first hearing, according to article 473 bis.17 of the Code of Civil Procedure, the petitioner is required to file three separate written defences (the first petition and two extended briefs by which all requests directed at fact-finding must be submitted to the court), while the defendant will be called to submit two different briefs.

Additionally, the deadlines for submitting the last two defences are very tight, requiring that replies be filed within five or ten days from the filing of the preceding briefs, notwithstanding the fact that, due to technicalities related to the functioning of the IT system adopted by Italian courts, full days may pass before a defence filed by one of the party become available to the other. Furthermore, whenever proceedings involve children, both parties are required to attach to the first written defences a large quantity of documents, which, at least in theory, should reveal their financial position, even if neither of them has made a financial request.

Before the Cartabia Reform, whenever talks concerning a possible relocation between par-

ents who had already ceased to live together in an "official" way (being legally separated or, if unmarried, having obtained orders concerning custody) entered an impasse, starting proceedings immediately tended to be a very sensible choice, since there was a reasonable expectation that the intervention of the judge could soon bring about an agreement or a decision without forcing the parties to incur in excessive expenses. Currently, the actions required by the new proceedings are so onerous that it might be better to seek any possible alternative before resorting to them.

According to Article 473 bis.15 of the Code of Civil Procedure, the parties may request an urgent order (*provvedimenti indifferibili*). Although these types of urgent orders should not be issued in the context of already pending proceedings, it would be possible to apply for them if a relocation is so imminent that it would be impossible to wait for the outcome of an ordinary judgement; consequently, applying for an urgent order would not be a viable option whenever a decision is needed concerning a move abroad well in advance of a move.

Therefore, a contested relocation can still possibly be handled fairly simply only when the parents disagreeing over the move are still living together (ie, not legally separated or divorced), because, in this case, the authorisation to relocate could be sought by starting the simplified proceedings set out in article 473 bis.38 of the Code of Civil Procedure. However, even in this case, if, after the filing of the petition, one of the parties applies for a "full" legal separation or custody judgment, the case should be dealt with in the context of the latter proceedings, and only urgent and temporary measures could be taken in the simplified judgment.

Conclusion

While a full evaluation of the impact of the three developments, possibly affecting judicial decisions on child relocation in the Italian legal system, summarily described above, will take some years, particularly with regard to the implementation of the Cartabia Reform, it can be concluded that, at least in "usual" situations, where parental responsibility is shared, the three trends will make it more difficult for one parent to force upon the other a decision to relocate abroad with a child much more difficult than in the past, even if the party willing to move is already the main caregiver, and especially if the decision to move, despite being legitimate, is not grounded on reasons directly serving the child's interest, but rather those of the parent wishing to move.

This means that, while the importance of seeking agreed solutions to relocation issues has become increasingly important, the position of the party who stands to be left behind has got much stronger. This same party can secure more favourable terms in exchange for agreeing to the relocation of a child with the other parent, and can thereby also negotiate the visiting rights and financial terms that they consider fair. Care must always be taken that consent for a child to move abroad should not be "sold", or mean an exemption from contributions to a child's maintenance costs.

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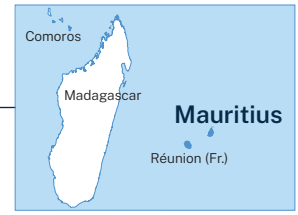

Law and Practice

Contributed by:
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The Chambers of Narghis Bundhun SC was founded more than 20 years ago by Mrs Narghis Bundhun, who spent the early years of her career in the Chambers of Guy Ollivry KC. Under the guidance of Mrs Bundhun and through her expertise in family law, this boutique chambers has become the leading family law set in Mauritius. The chambers is currently composed of eight tenants and is located within the historical legal quarter of Port-Louis. Despite family law being the primary area of practice, the barristers within the set remain committed to all aspects of Mauritian law by regularly accepting briefs in other aspects of civil and criminal law. Mrs Bundhun appeared as lead counsel in landmark cases before the Mauritius Supreme Court, and the Privy Council, including divorce settlements of high net worth individuals, cases regarding child relocation, child abduction and divorces entailing hotly contested jurisdictional issues.

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

In Mauritius, parental responsibility is known as *l'autorité parentale* and is defined in Article 371-2 of the Mauritian Civil Code. This concept entails a duty to protect the child's safety, health and morality and, in order to fulfil this duty, the parent is empowered with a right of custody (garde), supervision (surveillance), and a duty to educate the child. The holder of *l'autorité parentale* is also vested with the powers to manage the child's property.

Parental responsibility devolves in principle on biological parents whether married or not. In exceptional circumstances (for instance child abandonment, death of both parents, etc), the court can decide to entrust parental responsibility to a third party, who may or may not be related to the child.

1.2 Requirements for Birth Mothers

Parental responsibility stems from a legally established lien de filiation (parental link) between the child and the mother. This is achieved at the time of registration of the child's birth when the mother makes a voluntary declaration acknowledging the child as being hers. In the absence of such voluntarily acknowledgment at birth, the mother or the child may subsequently initiate proceedings before the Supreme Court with a view to have the parental link established (*une action en recherche de maternité/une action en réclamation d'état*).

It is of note that in practice in the majority of cases mothers acknowledge their children, making such judicial proceedings a rare occurrence.

1.3 Requirements for Fathers

Parental responsibility stems from a legally established lien de filiation (legal parentage) between the child and the father.

In the event that the child is born out of wedlock, the father needs to voluntarily acknowledge the child at the time of registration of birth. In the absence of a voluntary acknowledgement, the mother acting on the child's behalf or the child may initiate proceedings before the Supreme Court with the view to establish the legal parentage between the child and the father (*action en recherche de paternité/action en réclamation d'état*).

As regards a child born within marriage, by operation of the law (Article 312 of the Mauritian Civil Code), the mother's husband is presumed to be the child's father.

1.4 Requirements for Non-genetic Parents

In Mauritius, the only legally recognised situation where non-genetic parents can acquire parental responsibility is through an adoption. Indeed, the adopter automatically exercises parental responsibility as regards the child following the adoption order (see **1.7 Adoption**).

For the time being, there is a legal vacuum in Mauritius as regards same-sex couples and the status of children born through surrogacy. Hence, it is difficult to state the requirements that need to be met by parents in this situation to establish parental responsibility.

However, pursuant to Article 371-4 of the Mauritian Civil Code, the Supreme Court can order that a third party, whether related or not to the child, be entrusted with the latter's custody, if it is in the latter's best interest. The court will

determine the extent of the parental responsibility that this person will exercise over the child. This provision of the law can be interpreted to apply to the partner of a parent who has the custody of a child (ie, the step-parent who would not be biologically related to the child).

1.5 Relevance of Marriage at Point of Conception or Birth

The laws in Mauritius distinguish between legitimate and natural children. Children who are born within marriage are legitimate children. The mother's husband is presumed to be the father of the child as provided by Article 312 of the Mauritian Civil Code. For as long as the parents do not separate or divorce, both parents have joint parental responsibility.

The situation differs when it comes to a natural child. The parents shall exercise joint parental responsibility, only if they live within the same household as the child and both parents have acknowledged the child. Otherwise, parental responsibility will be exercised solely by the parent with whom the child resides.

1.6 Same-Sex Relationships

Same-sex relationships have no legal recognition in Mauritian law. In this instance the issue of parental responsibility as regards the parents of the same sex does not arise. There are currently no reported cases on this issue. Please refer to **1.4 Requirements for Non-genetic Parents** for additional information.

1.7 Adoption

Three types of adoption exist in Mauritian Law: an *adoption simple*, an *adoption plénière*, and a *légitimation par adoption* (Articles 343 to 370-5 of the Mauritian Civil Code). The distinction between the three types of adoption relate to the adoptee, the adopter and the consequences of each type of adoption.

Adoption Simple

In an *adoption simple*, any person can be adopted irrespective of their legal parentage (legitimate, natural or abandoned). A married couple or a single person, whether married, divorced or widowed, can apply to adopt. The adoptee's family name may be changed, but not their first name. The major consequence for the child is that they maintain a family relationship with the biological family and acquire another legal relationship within the adoptive family. For instance, the adoptee has inheritance rights in both their biological and adoptive family. An *adoption simple* can be revoked at the instance of the adoptee, the adopter, the biological parents and/or any interested party.

Adoption Plénière

In the case of an *adoption plénière*, any child can be adopted irrespective of their legal parentage (legitimate, natural or abandoned). Only married couples (and this only concerns legally recognised heterosexual marriages) can have recourse to this type of adoption. In terms of consequences for the adoptee, they sever all legal relationships with their biological family and are fully integrated into the adoptive family to the extent that their first name, as well as family name, can be changed by the adopting parents. An *adoption plénière* cannot be revoked.

Légitimation par Adoption

A *légitimation par adoption* only applies when the spouse of a person adopts the child of that spouse. The consequences are that the adoptee is fully assimilated to a child born from the marriage who can acquire the husband's family name and is deemed to be a legitimate child of

the marriage. This type of adoption is irrevocable.

In all three cases above, if the adopters are non-citizens (international adoptions), they must first apply to the National Adoption Council, which will ascertain whether in the circumstances it would be in the interests of the child to allow the application to proceed to the court, whether it is a bona fide application free of child trafficking issues and whether the application complies with the Hague Convention on International Child Adoption.

In all of the above instances the adopter/adopters will have parental responsibility as from the time that the court makes the formal adoption order.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

A parent who wishes to relocate abroad with a child must, in the first instance, seek and obtain the written consent of the other parent or that of any person who has custody of that child. This process has resulted from decades-long practice and is now substantive law embodied in Section 16 of the Children's Act 2020.

2.2 Relocation Without Full Consent

In the absence of such consent, the parent who wishes to relocate must apply to the Supreme Court to obtain an authorisation for the child to leave Mauritius and relocate.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

As set out in the landmark case of Muller v Masson [1974] MR 268 the paramount consideration for the court in such an application is the child's best interests. In determining whether the relocation is in the child's best interests, the court will ascertain whether:

- it is in the interest of the child to remain with the parent who has been granted custody whatever be the circumstances or whether other arrangements could be made for a transfer of custody;
- the parent who has custody has a legitimate motive for desiring to live away from the country; and
- any particular benefit which the child would derive from continuing to be with that parent would not be outweighed by the prejudice that might ensue to the child.

This principle is now entrenched in a settled line of precedents and has, since 2020, been codified through Section 4 of the Children's Act.

Subsequent Supreme Court decisions have added various factors to be considered in determining application for relocation. They are whether the parent who intends to relocate has made adequate and satisfactory arrangements as regards the child's schooling and education, the child's accommodation, the parent's financial means and the relevant permit for both parent and child to live and stay in the country.

In all cases, the court will take into consideration the arrangements proposed for the child to maintain meaningful contact with the stay-behind parent. In the event that the court finds

that the proposed arrangements are not satisfactory, it will set the relevant parameters.

2.3.2 Wishes and Feelings of the Child

Section 5 of the Children's Act 2020 provides that "every child who is of such age, maturity and stage of development as to be able to participate in any matter concerning the child shall have the right to participate in the matter and any views expressed by the child shall be given due consideration". As at the date of writing, there is no reported case on the application of this section.

Prior to 2020, in application of Article 388-1 of the Mauritian Civil Code, it was discretionary for the judge to hear a child. This was usually done through an informal meeting between the child and the judge hearing the case.

In a 2019, in a landmark case decided by the Mauritius Court of Civil Appeal, it was stated that there is an obligation for the trial court to keep a proper record of such hearing.

In a number of reported cases, it is merely mentioned that the child was heard in the course of the proceedings, but no indication is given whether the feelings and wishes of the child were the determining factor to allow the relocation or not, nor does the trial judge give an indication as to the weight given to wishes expressed by the child.

2.3.3 Age/Maturity of the Child

In the context of determining a custody issue, the traditional view as set out in Article 264 of the Mauritian Civil Code is that the court could hear a child if it was felt that it was necessary to have their view. The courts have applied the same principle in applications for relocation.

Following a 1999 amendment, Article 388-1 of the Mauritian Civil Code provides that the judge could hear and take into account the wishes of a child in any matters concerning them provided that they could form a view (*capable de discernement*).

Sections 4 and 5 of the Children's Act of 2020, now make it mandatory for a court to take the child's views into account, without setting out a minimum age.

In the reported cases, no mention is made as to the impact that the age/maturity of the child may have had on the decision-making process of the trial judge.

2.3.4 Importance of Keeping Children Together

Keeping the children together is of paramount importance to the trial court. This practice results from the application of Article 371-5 of the Mauritian Civil Code, which stipulates that a child should not be separated from their siblings unless it is impossible to do otherwise, or their personal interest so requires.

This rule has systematically been applied by the Supreme Court in determining custody-related matters.

It is noteworthy that there is no pronouncement by the Supreme Court in an application for relocation on this specific issue, but it can safely be assumed that the trial Court will be guided by the same principle.

2.3.5 Loss of Contact

The Supreme Court in Mauritius has, since 1974, systematically and consistently taken the view that the relationship and the contact with the "stay-behind parent" should not be severed

altogether. Over the years, this concept of maintaining contact has evolved. Initially, the court imposed a mandatory annual return to Mauritius for the child at the cost and expense of the parent seeking to relocate. Nowadays, in addition to this obligation of annual return, the court imposes a regular virtual contact requirement using modern telecommunications devices, as well as the communication to the address abroad, school report and health report. Please refer to **2.3.1 Factors Determining an Application for Relocation**.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

The case law pertaining to relocation has developed the concept of "legitimate motive", where the onus is on the parent wishing to relocate to demonstrate that they have a good reason to relocate with the child and have made adequate arrangements in the child's interests. Please refer to **2.3.1 Factors Determining an Application for Relocation**.

2.3.7 Grounds for Opposition to Relocation

The law does not provide clear grounds for objection to the relocation. The main and oft-raised ground of objection is that the relocation is not in the child's best interests due to the drastic change in the schooling system, change in language, cultural differences, or that the stay-behind parent will have their custodial rights curtailed. In any event, each ground of objection will depend on the facts and circumstances of the case.

2.3.8 Costs of an Application for Relocation

The costs of bringing an application for relocation vary greatly depending on the attorney and barrister whose services have been retained. They can range from anything between MUR150,000 to MUR500,000 (GBP3,000 to GBP10,000) for both legal advisers.

It is noteworthy that court fees in such applications are nominal.

2.3.9 Time Taken by an Application for Relocation

No precise timescale can be given since the time taken for an application will depend on the diligence of the legal advisers to have the case in shape and on the court's agenda. There are no rules or guidelines provided for judgment to be delivered within a set timeframe.

2.3.10 Primary Caregivers Versus Left-Behind Parents

Each case turns on its own merits. As stated in **2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?** the court will be more inclined to allow a parent to relocate abroad with the child if a "legitimate motive" is established. Even if the parent applying to relocate has already been granted the custody of the child, the court will nonetheless balance the rights of both parents before determining whether the child ought to be allowed to relocate.

There are limited reported cases where relocation has been refused by the court.

2.4 Relocation Within a Jurisdiction

Despite the fact that the Republic of Mauritius is an archipelago comprising of mainland Mauritius, and several smaller islands, this is a non-issue. As the law stands, there is no requirement for an application for relocation within the Republic of Mauritius; this question would instead tend to be debated when the parents are divorcing or seeking the exclusive custody of the child. It is then that the court will determine the child's place of residence within the country.

3. Child Abduction

3.1 Legality

In Mauritius, it is illegal to take a child outside the jurisdiction without the consent of the parents, or any person who has been entrusted with the custody of the child. This has been the constant state of affairs, from general provisions of the Mauritian Civil Code granting the custody and the "parental responsibility" of the child to a person, or the subsequent legislation such as the Child Protection Act 1994, the Convention on the Civil Aspects of International Child Abduction Act 2000, and the more recent Children Act 2020. It is a criminal offence to abduct a child.

3.2 Steps Taken to Return Abducted Children

If a child has been removed from Mauritius without the consent of the parents or any other person who has custodial rights (as per the provisions of the Children Act 2020), the steps to ensure the return of the child would depend on the country where the child was taken.

If the child was taken to a country that is not party to the Hague Convention, it would be advisable that the parent/person who has custody reports the fact to the local police station. Additionally, the illegal removal can be reported to the Child Development Unit (a unit created under the Ministry of Gender Equality and Family Welfare for the protection of the children). In the circumstance that the wronged parent does not have a formal court order, it will be advisable for the parent to obtain an Immediate Care and Control order or a custody order. Having those orders will make it easier to demonstrate that the child was under the custody of the wronged parent. Having a formal Court order will serve to support a process initiated in the country where the child would have been taken, thus facilitating the return of the child to Mauritius.

If the child was taken to a country which is a signatory to the Hague Convention, the faster route is for the wronged parent to report the wrongful removal to the Central Authority in Mauritius, who will in turn notify the Central Authority of the country to which the child has been taken. It would then be for the Central Authorities to co-operate, and to obtain the return of the child forthwith to Mauritius.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

Mauritius became a signatory of the Hague Convention in 1993, but it only became enforceable law in Mauritius when the convention was domesticated in 2000 (The Convention on The Civil Aspects of International Child Abduction Act 2000).

If a child is taken to Mauritius, the wronged parent would usually report to the Central Authority where the child was habitually resident. This Central Authority will then contact the Mauritian Central Authority. As a result of this, and in application of the obligations under the Hague Convention, that foreign Central Authority will be entitled to free legal advice, and representation in court by the state law counsel.

However, the wronged parent is not personally entitled to free legal advice and/or representation before the Mauritius court. They may retain the services of legal advisers in independent practice.

The Mauritian Central Authority has not published any official data regarding the number of Hague Convention cases for each year, and the outcome of each case.

In the reported cases before the Mauritius jurisdiction, it can be seen that it is mostly the parent who brought the child to Mauritius who will use the defences provided in the Hague Convention – especially the fact that the child is now settled in their new environment, or that there is a grave risk that the child's return would expose them to physical or psychological harm or otherwise place them in an intolerable situation. However, it is difficult to say from the reported cases that there is a clear trend either way of ordering the return of the child, or that the court is sympathetic to the defences provided by the Convention. The court is fair, and upon examination of the defences raised, it can still decide to order the return of the child.

There are no reported cases where the Mauritius court orders the return of a child to a country that is not a signatory to the Hague Convention. It is thus difficult to state clearly what is the procedure to return the child. However, in application of the Children Act 2020 and the Mauritian Civil Code, the principles that the Mauritius court would take into account to order the return a child to another jurisdiction are always to examine whether it is in the best interests of the child to do so. Another principle would be whether the person indeed has custody or custodial rights over the child, that can result either from an agreement between the parents or as a result of a court order.

If the child was taken from a Hague Convention signatory, the costs are nil for the wronged parent in light of the legal aid assistance obligations which exist between the Central Authorities.

The wronged parent may still choose to hire lawyers (an attorney and a barrister) in independent practice to assist them once the application is before the Mauritius Court.

The procedure relating to a request for a return under the Hague Convention could be pleaded on paper by way of affidavits. However, there is a growing trend when the parties, their respective experts (psychologists or medical professional) or teachers are called to give oral evidence before the Court in order to establish one or several defences provided by the Convention. This tends to lengthen the procedure.

On average, there is approximately a year between the moment the application for return is made and the time that judgment is delivered by the court.

A return order is stayed in case of an appeal. Thus, the delay for the return of the child is extended, and this may take another year for a final decision.

It is of note that a further appeal can lie to the Judicial Committee of the Privy Council. There is only one reported case where such an application was made, but leave to appeal was refused. The matter was not pursued further.

3.4 Non-Hague Convention Countries

This question is not applicable to Mauritius since it is a signatory to the Hague Convention.

Trends and Developments

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Introduction

Mauritius has no indigenous population. Over the centuries, it has become populated through various waves of migration from Europe, Africa and Asia. Regular, inward and outward migration has to date remained an inherent feature of Mauritian society. Therefore, the issue of relocation is a common one. This situation is enhanced by globalisation, increase in marriages and partnerships between persons of different nationalities, and government policy to encourage non-citizens to settle in Mauritius.

Mauritius acceded to the United Nations Convention on the Rights of the Child in 1990 and ratified the African Charter on the Rights and Welfare of the Child in 1992. The courts could not apply the principles set out in these two international instruments, as neither had been domesticated. Over the years, the Mauritius Law Reform Commission has made a number of recommendations to the national legislature to incorporate these two instruments in our national laws. There were drawn-out consultations over nearly 20 years, but it was only in 2020 that Parliament voted on the Children's Bill, which sought to include part of these two texts and their respective general spirits. This act replaces the Child Protection Act 1994, and consolidates in one instrument legislation regarding children's protection, as well as offences on the person of a child that were scattered throughout other legislation. Act 13 of 2020, the Children's Act, was proclaimed on 24 January 2022 and became law.

This new piece of legislation codified a number of principles previously elaborated by the courts. It brought a number of novelties, the most important of which are the creation of a dedicated Children Court, the clear and unambiguous minimum age for marriage, and created the offence of unlawful relocation of the child in the absence of the prior written consent of the other parent (or any such person who has custody of the child). It also lays more emphasis on the children, their views, and their inclusion in any application that concerns them or that would impact their lives.

The Novelties of the Children's Act 2020

Prior written consent for relocation

One of the major innovations of the Children's Act regarding cases of child relocation abroad is the codification and consolidation of the practice whereby the parent wishing to relocate abroad had to seek and obtain the prior consent of the stay-behind parent. Prior to the coming into force of this Act, the need to obtain prior written consent before envisaging a relocation was a discretionary practice. The parent wishing to relocate could make their application directly to the court, and very often, the stay-behind parent was taken by surprise, as they would only become aware of the other parent's intention upon being served with the relevant court papers. It is now explicitly set out within our codex of law, namely Section 16, that prior written consent has to be sought and obtained prior to relocating abroad, or making an application before the court.

In a judgment reported in 2022, that is after the coming into force of the Children's Act, the Supreme Court stated in obiter that the failure to obtain written consent from the stay-behind parent does not preclude the parent from lodging an application before the court, and for the court to entertain such an application. It is however of note that in this judgment, the application was made well before the adoption of the Children's Act.

The court may well form a different view in an application that is made subsequent to the coming into force of the Children's Act.

The underlying design of this section of the Children's Act appears to encourage parties to communicate and to reach a conscious and consensual decision regarding the future of the child, instead of an antagonistic one reached through lengthy court proceedings. However, the legislature was aware that this may not often be achievable given the breakdown of the relationship between the parents, and the likely animosity that may exist between them. This is the reason why in any circumstance the ultimate recourse lies with the court. This was emphasised by the 2022 judgment.

Furthermore, it is now a criminal offence under the Children's Act to remove a child from Mauritius without the prior written consent of the other parent. The penalty provided for non-compliance with this section is a fine not exceeding MUR200,000 (GBP4,000) and a term of imprisonment not exceeding five years.

It is the first time in Mauritian legal history that specific reference is made to issues that may arise in child relocation cases.

The voice of the child

The Children's Act 2020 is in essence a statute codifying principles that have been developed over time through case law. A further novelty resides in the emphasis placed on the child's participation in any proceedings concerning them. Shifting from a discretionary power of the court to decide whether to hear the child or not, it has now become mandatory for every court, every person, every institution or any other body to give the child an opportunity to be heard on any matter concerning them (in application of Section 4 of the Children's Act).

Subsection 2(g) of the same section also makes it mandatory for the child's views to be taken into account. The views of the child will henceforth become an additional criterion and probably a determining factor in the trial judge's assessment of the case. It is expected that there will now be explicit reference to the views expressed by the child contrary to what occurred previously where the trial judge would merely make a passing comment to the effect that the child had been heard. On this point, a recent appellate decision relying on Article 12 of the UNCRC and prior to the enactment of the Children's Act, directed that proper notes of the meeting between the child and the trial judge ought to be faithfully recorded, preferably verbatim, in a question and answer format so that in case of appeal the appellate court has access to those notes to determine whether the views of the child were indeed taken into consideration by the trial judge.

Another important feature of the new Children's Act is that the child must be informed of the outcome of any proceedings, act or outcome made regarding them. However, a caveat is attached to this new rule as it is dependent on the child's age, maturity and stage of development. This is yet again a new feature of Mauritian law.

In light of the fact that these new features regarding the importance placed on the views and voice of the child are of general application, there is no doubt that in future they will apply equally to relocation cases.

The issue of custody

Until the coming into force of this new legislation, there was a regular debate on the possibility

for divorced or separated parents to continue exercising joint custody. The question that often arose was whether the court had jurisdiction to make a joint custody order, or whether the parents could so decide. This has been a grey area in Mauritius law and there are only three reported cases which state that such course of action was possible.

This issue has been put to rest by the enactment of Section 7 of the Children's Act which now provides that more than one person may hold parental responsibilities and rights in respect of a child. There can be no lingering doubts that joint custody is now part and parcel of our law. This new element is likely to impact the manner in which the court will approach relocation applications in those instances where parties have agreed on joint custody or the court has so ordered. Indeed, the principles which have governed relocation applications may need to be reviewed as one of the limbs of the original test as set out in a 1974 judgment, and consistently applied by the courts in a settled line of precedents, is for the court to consider whether the parent who has custody of the child had a legitimate motive to relocate.

The enactment of the Children's Act will inevitably invite the court to review this limb of the test in relocation applications. Indeed, in the event of an existing joint custody order, with one parent wishing to relocate, there might be a need for the court to vary the initial joint custody order before addressing the question of relocation.

Conclusion

The Children's Act has taken decades to become a reality. There are high hopes and expectations for its implementation. It is still in its early stages and teething issues have arisen. Practitioners will be expected to become proactive and innovative in their approach, and the courts will have to respond to those innovations, by inter alia moving from their comfort zone and possibly now redundant tests. Only time and practice will test the efficiency and effects of this new piece of legislation. It is also noteworthy that due to the novelty of the Children's Act, there is yet to be any reported judicial pronouncement on most of its creations regarding relocation applications.

MEXICO

Law and Practice

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

The parents' decision-making power is known as *patria potestad* (parental authority) under Mexican law. It is defined as the rights and responsibilities parents have over minor children and their property.

The Mexican highest courts of justice have defined *patria potestad* both as a privilege and as a duty of parents, which is limited by the best interests of the children principle.

Patria potestad comprises three aspects of a parent-child bond: (i) legal custody, (ii) physical custody and (iii) access and visitation rights.

1.2 Requirements for Birth Mothers

A mother automatically acquires *patria potestad* of the child when the child is born, from the natural fact of giving birth to the child.

1.3 Requirements for Fathers

The requirements fathers have to meet in order to have *patria potestad* depend on two types of circumstances: (i) children born from a married couple or (ii) children born from non-married couples.

Children born from married couples will be subject to the joint *patria potestad* of both parents.

An unmarried father may obtain *patria potestad* by: (i) recognising a child as his own (provided such recognition is not contested by the mother of the child) or (ii) going through a judicial procedure to obtain a declaratory judgment of paternity (based on DNA testing).

1.4 Requirements for Non-genetic Parents

Non-genetic parents may obtain *patria potestad* (i) through an adoption process before the Courts for Family Matters, or (ii) by assisted reproduction.

1.5 Relevance of Marriage at Point of Conception or Birth

See **1.3 Requirements for Fathers**.

1.6 Same-Sex Relationships

Same-sex couples are allowed to have children (progeny). The First Chamber of the Mexican Supreme Court, based on the fundamental right of non-discrimination, has ruled that same-sex couples, and also single individuals, can become parents of children.

1.7 Adoption

In Mexico, the requirements for adoption are:

- that it is beneficial for the minor;
- that the adopter is over 25 years of age and 17 years older than the adopted minor;
- that the adoptive parents have sufficient means to provide for the minor; and
- that the applicant for adoption clearly and simply states the intention to adopt; demonstrates an honest, moral and social way of living; and that they have not been prosecuted or are not pending criminal proceedings for crimes against the family, sexuality or health.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

Both parents with *patria potestad* over the child must jointly grant their consent for the child to be relocated, either domestically or internationally.

2.2 Relocation Without Full Consent

If one parent wishes to relocate their child without the consent of the other parent who jointly holds *patria potestad* of the child, the parent intending to relocate will need to obtain a Mexican court's final and binding approval for such relocation. This, of course, will usually involve extensive litigation between the parents of the child.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

In Mexico, two principles apply to any dispute involving minor children (namely, children under 18 years of age): (i) the best interests of the child and (ii) the principle of progressive autonomy.

2.3.2 Wishes and Feelings of the Child

In Mexico, pursuant to Article 4o of the Mexican Federal Constitution and Article 12 of the New York Convention on the Rights of the Child, bodies of law which are considered of supreme nature in Mexico, a child involved in judicial procedures has the fundamental right to be heard by the courts in any proceeding whose outcome may affect that child. However, the voice of the child is not necessarily binding, since certain factors, such as the maturity of the child, are to be weighed by the courts.

2.3.3 Age/Maturity of the Child

In Mexico, minor children may exercise their rights progressively as they develop a higher level of autonomy. In other words, the right of parents to make decisions for a child diminishes as their child gets older, allowing the children to make their own decisions. This means that by the time a certain degree of maturity is reached by the child, the latter can make decisions regarding their place of residence. Nonetheless, all statements made by a child during court proceedings must be assessed by a judge in the light of all the factual background surrounding the case and the evidence provided by the contesting parties.

2.3.4 Importance of Keeping Children Together

It is a priority for judges to enable children to remain with their siblings. However, a court shall always procure to evaluate the specifics of each case in order to make a decision that is focused on the best interests of the children and which provides the best environment for them.

2.3.5 Loss of Contact

Great relevance will be placed on the fact that relocation can cause loss of contact between the child and the left-behind parent, since children hold the fundamental right to have access to both parents, whether the latter live together or separately. Therefore, judges, when deciding a relocation dispute, must address all aspects that are relevant to allow the relocated child to maintain close ties and bonds with the left-behind parent.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

Reasons for which a judge may consider granting relocation include:

- the opportunity for the applicant parent to have a better life along with their children in the proposed new location;
- returning to a location where extended family members of children are living;
- returning to a location where the applicant parent is originally from, and thus the child benefiting from returning to their own cultural roots and background;

- having a better chance to get a job in a location where the applicant parent is originally from;
- the applicant parent having a place to live that is suitable for the children;
- the applicant parent giving the children the opportunity to receive a better education in the new location;
- the applicant parent giving the children the opportunity to benefit from a better healthcare system in the new location; and
- the new location would provide a better, safer and more secure environment for the children.

2.3.7 Grounds for Opposition to Relocation

Grounds for opposition include:

- the left-behind parent simply not giving consent to the relocation based on jointly holding *patria potestad* over the child, and, since *patria potestad* comprises rights and obligations, these will be affected by the relocation;
- children already having a secure home and environment in their current place of habitual residence;
- having a better lifestyle in the habitual residence due to higher living costs in the proposed new location;
- having extended family members in the habitual residence and not in the proposed new location (including grandparents);
- children not having their friends in the new location;
- children not being nationals of the new location (issues related to immigration are often raised);
- children not having a place to live in the proposed new location, or the proposed new home not being located in a safe neighbourhood or environment;
- children having access to better schools in their current place of habitual residence;
- preventing the left-behind parent from having access to their children; and
- children not understanding the language or not being able to communicate properly in the proposed new location.

2.3.8 Costs of an Application for Relocation

It is difficult to provide the costs for bringing an application for the relocation of minor children since it will depend on the specifics of the case and the new location. The costs will also depend on the strategy adopted by the opposing counsel (eg, delaying the proceedings). The extensive judicial review process of the Mexican legal system can cause the costs to increase for the litigating parties.

2.3.9 Time Taken by an Application for Relocation

It is hard to provide a timescale for an application to be determined because it will depend on the specifics of the application, the factual background, the evidence, the strategy used by the opposing counsel, court workload, etc. However, it could take between 18 months and three years, considering the levels of judicial review in the Mexican procedural system.

2.3.10 Primary Caregivers Versus Left-Behind Parents

The best interests of the children is considered to be the most important factor for a judge in ruling on an application. Notwithstanding, it is important to note that, factually, women usually tend to enjoy better protection than men in certain child-related dispute litigation cases.

2.4 Relocation Within a Jurisdiction

Relocation to a nearby location might change the point of view of a judge, because one of the many things that a judge must consider is

whether a child's access to the left-behind parent shall be duly addressed.

Relocation within the same state is also likely to be considered by a judge in connection with access rights being duly protected.

Relocation to a separate Mexican state is harder for a judge to consider since it will depend on the distance between the place where the left-behind parent will continue to live and the child's new home. Distance, due to the size of the Mexican territory, might become problematic in ensuring the child's access rights to the left-behind parent.

3. Child Abduction

3.1 Legality

It is wrong and unlawful to remove a child without the consent of the other parent who jointly has legal custody (namely, *patria potestad*) of the child. Mexico is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention").

3.2 Steps Taken to Return Abducted Children

If a child is wrongfully removed from Mexico, the steps to be followed will depend on the country to which the child has been abducted, or where the child is being unlawfully retained by the abducting parent. An applicant parent will generally have three options, as set out below.

- If a child is taken to a country which is a signatory to the Hague Convention, the applicant parent may file their restitution application with the Mexican Ministry of Foreign Affairs (*Secretaría de Relaciones Exteriores*). The latter was appointed by the Mexican government as the Central Authority under the Hague Convention to procure the fulfilment of this international treaty. The Mexican Central Authority must send the application with supporting documentation to the central authority of the country where the child was unlawfully taken to, or where the child is unlawfully being retained. Usually, the foreign central authority will send the application to the judiciary for a court to be assigned to resolve the Hague application. Nonetheless, the applicant parent may opt to file an application/petition directly with the courts having jurisdiction in the country the child was taken to.
- If a child is taken to a country which is a signatory to the Inter-American Convention on the International Return of Children, the applicant parent must file an application/petition/request with the Mexican courts or Mexican Central Authority (*Secretaría de Relaciones Exteriores*) or the diplomatic or consular channels. The Mexican Central Authority oversees compliance with this international convention. Once the application/petition is filed, it should be forwarded, through the proper channels, to the central authority in the country where the child was taken. The judicial or administrative authority where the child was taken shall implement the relevant proceeding for the child's safest return to the habitual residence (Mexico).
- If a child is taken to a country with which Mexico does not have an international convention on child abduction in place, the proper avenue to follow is through the Mexican court system seeking international judicial co-operation, requesting the assistance of the courts in the location where the child was taken, arguing the "best interests of the child" standard, with the expectation that the courts abroad will honour such international judicial request. It is advisable to pursue an

entire proceeding before the Mexican courts to obtain a final ruling requesting the safe return of the child. It is also important to mention that the firm has advised its clients to obtain advice in such cases to ensure that (i) the Mexican final ruling will be deemed enforceable abroad or (ii) the applicant parent can directly file an application/petition for the safe return of the children.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

Free legal advice may be provided by a Mexican public defender (Public Defender Office), if requested by the applicant parent. The Mexican Central Authority is required (i) to be in contact with the foreign central authority to provide the status of the restitution procedure, (ii) follow-up the proceedings before the courts, and (iii) to appoint a member of staff to attend hearings to ensure the fulfilment of the Hague Convention. The Mexican Central Authority does not provide legal advice during the international restitution procedure.

The main guidelines on the application of the Hague Convention have been provided by the Mexican highest courts of justice, which have ruled in binding and persuasive precedents that the main purpose of this international statute is to uphold the best interests of the child principle, which is achieved by the Mexican courts ordering the immediate return of a child to their place of habitual residence, and that the only exceptions or grounds of defence are limited to those specifically listed in Article 13 of the Hague Convention. However, considering that Hague Convention proceedings are handled by the Mexican state courts, such Hague proceedings in several Mexican jurisdictions are not always expeditious since some courts are not respectful, or at best, do not understand, the underlying principles of the Hague Convention.

According to Article 1159 of the National Code of Civil and Family Procedures, once the application has been filed, the judicial authority has 24 hours to rule on its admission. Once it is admitted, it will issue all the necessary precautionary measures and schedule an appointment to listen to the views of the child. The alleged abducting parent will also be ordered to appear before the court with the child and to offer evidence, within the following three days. At a single hearing, the judicial authority shall attempt to reconcile the parties so that the child is voluntarily returned to the place of their habitual residence. If this is not achieved, the presumed abducting parent may assert the applicable grounds of defence and produce all relevant evidence as provided by the Hague Convention. The child shall also be heard. Subsequently, the evidence will be obtained and, lastly, a judgment will be delivered at the same hearing. In this procedure, the due process and the best interests of the child must be respected.

It is difficult to provide the costs for representing an applicant parent for applications under the Hague Convention, since it will depend on the specifics of the case and the location. Likewise, it will also depend on the strategy adopted by the opposing counsel (eg, delaying the proceeding).

Likewise, it is hard to provide a timescale for an application to be determined; this depends on the specifics of the application, the factual background, the evidence, the strategy used by the opposing counsel, court workload, etc. However, it could take between 18 months and three years, considering the levels of judicial review in the Mexican procedural system.

3.4 Non-Hague Convention Countries

With non-Hague Convention countries, to seek the return of an abducted child, the left-behind parent is to file a petition before the Mexican courts, and arguing the best interests of the child principles, seek international judicial co-operation as provided by the applicable Mexican laws and binding precedents.

Trends and Developments

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Uniformity Code for Civil and Family Matters

Mexico has taken a great leap into the future by enacting a uniformity code of civil and family proceedings, which will binding in all 32 states of Mexico, for the international return of children and adolescents.

The National Code of Civil and Family Procedures (hereinafter the "National Code"), was published in the Federal Official Gazette on 7 June 2023, which will come into effect gradually upon a declaration by each local congress stating that the local judiciary is ready to apply such uniformity code.

For instance, Mexico City Congress made its declaration on 4 July 2024 on the coming into effect of the National Code. Accordingly, international family proceedings provisions, including international restitution cases, will become effective on 1 June 2025.

Meanwhile, the Code of Civil Procedures for Mexico City will continue to govern all procedures to be brought under the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the "Hague Convention").

Major Improvements in International Family Matters

One of the National Code improvements is that it expressly recognises jurisdiction in international return matters in favour of the judicial authority having jurisdiction in the place where the child is located. This inclusion helps applicants to have clarity about which court will hear and resolve their case.

Before the National Code was enacted, the above-mentioned rule of jurisdiction was an implied jurisdiction derived from the interpretation included in some judicial precedents of the best interests of the child principle.

Major clarity for restitution procedures

Furthermore, the National Code gives the judicial authorities the power to grant emergency measures, in order to ensure the welfare of minors and prevent them from being wrongfully removed or retained. Such provision is consistent with the Hague Convention, which provides that all appropriate measures must be adopted to locate a child that has been wrongfully removed or retained.

It is also important to note that, under the National Code, restitution procedures do not focus on custody and/or guardianship but only determine whether a child should be returned to their habitual residence or not. Likewise, it provides that no custody proceeding in Mexico may stay the enforcement of a restitution ruling.

The foregoing is consistent with the Hague Convention in the sense that such international statute provides that (i) no decision regarding the custody or foreign custody-related ruling made in the requested state shall justify the refusal to return a child, and (ii) any restitution-related decision shall not affect the merits of the custody rights.

The National Code expressly states all the exceptions to the return provided for in Articles 12, 13 and 20 of the Hague Convention, in the sense that the jurisdictional authority may reject an application for the return of a child or adolescent when the person opposing the return proves that:

- the person, institution or body making the return application did not effectively exercise the right of custody at the time they were

removed or retained, or had consented to or subsequently accepted such removal or retention;
- there is a grave risk that the return of the child would expose the child to physical or psychological danger, or otherwise place the child in an intolerable situation;
- the child objects to the return, if the child has reached an age and degree of maturity at which it is appropriate to take the child's views into account;
- the restitution could violate the human rights recognised in the United Mexican States and the procedures created for their protection; and
- the request for restitution has been filed one year after the removal or retention occurred and the child or adolescent has already adapted into their new environment.

The National Code also adopts a maximum term of one year to initiate restitution proceedings, starting from the date on which the child was wrongfully removed or retained. In these cases, the competent authority must order the immediate return of the child. However, in the case of children whose whereabouts are unknown, the term will be computed from the date they are located. This last provision is more beneficial to applicants applying for a child's return under the Hague Convention.

It is also established that any request for return from abroad will be submitted through the Ministry of Foreign Affairs, which is the Mexican Central Authority responsible for forwarding it to the competent jurisdictional authorities.

If the child is found in Mexico, all appropriate measures must be taken to achieve their voluntary return. In such a case, the Mexican judicial or administrative authorities are empowered to invite the parties to mediate for a voluntary return. However, in the event that parents do not agree on the return of a child, the judicial or administrative proceedings must be initiated in order to obtain the return or, as the case may be, to allow the access rights.

The National Code sets out the following minimum requirements that the application for restitution must contain:

- name and general information about the child or adolescent;
- name and personal information about the applicant and the capacity in which they are filing the application with respect to the child or adolescent;
- background and the facts relating to the removal or abduction;
- the name of the person who is alleged to have wrongfully retained or removed the child and the address or location where the child or adolescent is alleged to be; and
- any information that is necessary or relevant to their location.

The National Code is also clear in establishing the documents that must be submitted together with the application for international return, namely:

- a copy of the document evidencing the custody of the child or adolescent requested;
- proof of the habitual residence of the child or adolescent;
- any other document evidencing the child or adolescent's life at the habitual residence;
- photographs and other specific information relating to the identity of the child or adolescent if applicable; and

- the translation of the documents submitted in a language other than that of the country to which the restitution is requested.

In this regard, the National Code is more flexible than the provisions of the Hague Convention, since it does not require certificates or affidavits.

Additionally, the National Code provides that any request for return shall be preferential and, unless there is special consideration by the jurisdictional authority, must be concluded within six weeks of its submission, which is also consistent the Hague Convention.

New steps for the return of a child before the Mexican courts

Once the return application has been filed, the jurisdictional authority will have a period of 24 hours to decide on its admissibility. Previously, this time limit for issuing the initial order did not exist under the local procedural laws; now, this time limit is expressly recognised, in line with the principle of celerity under the Hague Convention.

If the application is admitted, the jurisdictional authority will order the party that is presumed to have unlawfully retained or removed the child or adolescent to be notified so that, subject to the corresponding legal requirements, they may appear before the judicial authority within the following three working days accompanied by the child or adolescent, as well as all the evidence they consider necessary to support their objection to the restitution, if applicable. The order admitting the application must provide for the necessary emergency measures and, if necessary, order an interview with the child or adolescent.

In a single hearing the jurisdictional authority will seek to conciliate the parties to realise the voluntary restitution of the child and the requested party must state whether they accept to voluntarily return the child or adolescent. If so, the corresponding record shall be drawn up with the conditions granted by the parties, and said agreement shall be approved by the jurisdictional authority. If there is an objection to the restitution, whoever objects shall assert the applicable grounds for opposition and provide the corresponding evidence to support them. In this hearing, the jurisdictional authority will interview the child or adolescent. Once this has happened, the authority will decide whether or not to admit the evidence offered and then proceed to its examination.

Once the evidence has been obtained, the judicial authority must decide on the restitution during the same hearing. If the restitution is granted, the jurisdictional authority will deliver the adequate and effective measures to guarantee the safe return of the child or adolescent. The judicial authority must inform the Ministry of Foreign Affairs of its decision.

In summary, this new uniformity code is relevant, not only because it adopts, at the domestic level, provisions and principles of the Hague Convention, but also because it is applicable in cases in which the request comes from a country that is not a signatory to the Hague Convention.

Domestic Child Abduction

Lastly, the National Code recognises national abduction cases, thereby providing for a specific judicial procedure in order to determine whether a child or adolescent should return to their home state or not.

PORTUGAL

Law and Practice

Contributed by:
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Divórcio & Família – Nuno Cardoso Ribeiro Advogados (D&F) is a boutique law firm based in Lisbon, founded in 2018 by Nuno Cardoso Ribeiro, who is also the firm's co-ordinator. With a team of ten lawyers and legal professionals, D&F is dedicated exclusively to family law, and seeks to provide differentiated and personalised legal support in the areas of divorce, parental responsibilities regulation, family home allocation, alimony, division of matrimonial estate and succession. The team's vast experience in international cases led to its special focus on international divorce and international child abduction, working closely with lawyers of various jurisdictions, including the USA, Germany, the Netherlands, Estonia, France, the UK, Italy, Australia and Israel.

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

Under Portuguese law, a parent's authority over children is defined as the power and duty "to, in the interest of the children, ensure their safety and health, provide for their maintenance, direct their upbringing, represent them (even when unborn), and administer their property" (article 1878.º, no. 1, of the Portuguese Civil Code, or CC).

This power/duty, known as "parental responsibilities", is assigned automatically, by operation of the law, to the people registered as the child's parents (articles 1797.º, no. 1, and 1877.º et seq CC) and empowers a person to make decisions in relation to every aspects of the child's life, including the issues most relevant to the child's life and development, referred to in Portuguese law as "matters of particular importance".

Matters of Particular Importance

The law does not provide a definition for this concept, leaving its definition to legal doctrine and case law.

Since, by law, decisions concerning matters of particular importance require both parents' consent (even during a marriage or civil partnership), it is understood that these are decisions that may have a significant impact on the child's development and wellbeing.

Despite case law arguing that the classification of a given issue as a matter of particular importance should be made on a case-by-case basis (see decision of the Oporto Court of Appeal dated 27 January 2020 and decision of the Lisbon Court of Appeal dated 2 May 2017), there is a consensus that the following issues are of particular importance:

- the relocation of the child to a distant location within Portugal or to another country;
- the child's enrolment in a private school;
- surgical interventions which may result in increased risks to the child's health;
- the practice of extreme sports activities;
- the employment of children, or their participation of children in shows or advertisements; and
- religious education, up to the age of 16.

Acts of Everyday Life

In contrast to "matters of particular importance", either parent can make decisions alone, without requiring the other's consent, regarding the child's day-to-day activities, referred to in Portuguese law as "acts of everyday life";

These are decisions or issues that do not imply significant consequences to the life of the child, such as:

- decisions about leisure activities;
- the act of taking and picking up the child from school regularly;
- assisting the child with his or her schoolwork; and
- decisions about daily hygiene, clothing, footwear, etc.

Exercise of Parental Authorities

How parental authorities are exercised depends, under the terms of the law, on whether the parents live together as a couple (under the context of marriage or civil partnership) or are separated.

Separated parents must formally regulate the exercise of parental responsibilities, either by agreement, which must be approved by a Public

Prosecutor and ratified by judicial or administrative decision, or through a judicial proceeding called "parental responsibilities regulation".

Although children owe obedience to their parents, the parents must take into account their children's opinions and autonomy, according to their age and maturity (article 1878.º, no. 2, CC).

1.2 Requirements for Birth Mothers

Parental responsibilities are attributed to the biological mother with the establishment and registration of motherhood.

Establishment of Motherhood

According to Portuguese law, biological motherhood "results from the fact of birth" and is established by indication (article 1796.º, no. 1, CC).

For this purpose, the law prescribes the obligation for parents, their representatives and their next of kin to declare the birth and identify the mother, within 20 days of the date of birth (article 96.º, nos. 1 and 2, of the Portuguese Civil Registry Code). The birth declaration may also take place at the hospital or health centre where the birth took place, until the mother is discharged (articles 96.º, no. 2, al. c) and 96.º-A of the Portuguese Civil Registry Code).

If the birth declaration is made:

- within one year of the birth, the motherhood indicated is registered (article 1804.º, no. 1, CC);
- one year or more after the birth, the motherhood indicated is also registered, but only if the person indicated as mother confirms the birth (article 1805.º CC).

Without the identification of the mother, she can declare the maternity at any time, unless the paternity is registered in favour of a person other than the husband and the child was born or conceived during the marriage (article 1806.º CC).

The established motherhood can be challenged in court at any time, through a special procedure of impugnation of maternity, by providing evidence that the registered mother is not the biological mother of the child.

1.3 Requirements for Fathers

Like biological mothers, biological fathers are endowed with parental responsibilities with parenthood's establishment and registration.

Establishment of Fatherhood

According to Portuguese law, biological fatherhood is either established by presumption, in favour of the mother's husband, or by recognition, in cases of filiation outside of marriage or in which the presumption does not apply (article 1796.º, no. 2, CC).

Presumption of paternity

Presumption of paternity operates, as a rule, as long as the child is born or conceived during marriage (article 1826.º, no. 1, CC). There are, however, some exceptions relating to cases in which children are conceived before marriage or after the spouses' separation (articles 1828.º and 1829.º CC).

Furthermore, and in any case, the married woman may always declare the birth with the indication that the child is not her husband's, in which case the presumption will cease to apply and paternity will have to be established by recognition (article 1832.º, no. 1, CC).

Establishment by recognition

Portuguese law provides for two ways of establishing paternity by recognition:

- "*perfilhação*", a voluntary declaration by the father acknowledging the child as his own; or
- judicial decision, through a special procedure called an "investigation process" (article 1847.º CC).

The voluntary recognition of a child does not depend on the mother's authorisation, nor is any relationship between the mother and the father required. Likewise, the relationship of the father with another person at the time of conception or birth does not prevent the recognition.

However, the declaration must be based on genetic truth, and false statements are a criminal offence under the terms of article 348.º-A of the Portuguese Criminal Code.

Both the presumption of paternity and the voluntary recognition of the child may be challenged through a special procedure of impugnation of paternity, by providing evidence that the registered father is not the biological father of the child.

1.4 Requirements for Non-genetic Parents

The establishment of filiation in these cases has specialities, regulated in Law no. 32/2006 of 26 July (also called the Law on Medically Assisted Procreation, or LPMA).

Medically Assisted Reproduction

Medically assisted reproduction techniques are authorised in Portugal as subsidiary methods of procreation (article 4.º, no. 1, LPMA). They are available to:

- women, either individually or as female couples, without the need of a special diagnosis or any medical justification; and
- different-sex couples, upon a diagnosis of infertility, for the treatment of serious illness or to prevent the risk of transmission of diseases (article 4.º, nos. 2 and 3, and article 6.º, no. 1, LPMA).

In order to be submitted to these techniques, beneficiaries must give their free and informed consent, expressly and in writing, to the medical doctor in charge (art. 14.º, no. 1, LPMA).

Consent may be freely revoked until the start of the treatment (with the exception of a surrogate mother who, according to the law, may revoke her consent until the declaration of birth of the child, as per article 14.º, nos. 4 and 5, LPMA).

Artificial insemination and in vitro fertilisation

In cases of artificial insemination, the fatherhood of the semen donor shall not be considered. Instead, fatherhood will be established in favour of the beneficiary's spouse or unmarried partner. For this purpose, the spouse or unmarried partner must consent to the technique of medically assisted reproduction, along with the beneficiary (as per article 20.º, no. 1, LPMA).

The same rules apply when in vitro fertilisation is carried out using donor oocytes or semen (article 27.º LPMA).

Surrogates

Although foreseen in legislation, this medically assisted procreation technique is not yet properly regulated and therefore is still not available in Portugal.

1.5 Relevance of Marriage at Point of Conception or Birth

As explained above, parental responsibilities are attributed by law to both registered parents,

regardless of whether they are married to each other.

Indeed, marriage at point of conception or birth is only relevant due to the presumption of paternity, applicable to different-sex couples who use natural methods of reproduction.

In cases of medically assisted reproduction, marriage has no specific relevance, as the paternity/maternity is established in cases of both marriage and civil partnerships, upon informed consent of the beneficiary's spouse/partner.

1.6 Same-Sex Relationships

Parents in a same-sex relationship do not have to meet additional requirements to obtain parental responsibilities. However, the establishment of filiation for these couples has specialities:

- the rules for the establishment of biological motherhood/fatherhood, as described above, do not apply;
- medically assisted reproduction is only available to female couples, who may also resort to adoption;
- cisgender male couples, on the other hand, may only have children together through adoption; and
- same-sex couples in Portugal have access to adoption under the same terms as different-sex couples.

From the moment parenthood is established for both parents, same-sex parents exercise parental responsibilities simultaneously, under the same terms as different-sex couples.

1.7 Adoption

In Portugal, adoption has the same effects as natural filiation (as per article 1586.º CC). Hence, once decreed, adoptive parents obtain parental responsibilities automatically (article 1986.º, no. 1, CC).

People can apply for adoption, individually or as a couple, as long as they are 25 years old or older. Portuguese law also provides for the adoption of the spouse's/civil partner's child.

Procedure

Adoption is decreed by court order, through a special procedure regulated by Law no. 143/2015 of 8 September.

This procedure aims essentially at verifying whether the special requirements for adoption are fulfilled, as well as collecting the consent of the following people:

- the adoptee, if older than 12 years of age;
- the prospective adopter's spouse or partner;
- the parents of the adoptee, unless the child is living with his or her grandparents or uncles/aunts, or the court has applied a protection measure, entrusting the child to the prospective adopters or to an institution in view of future adoption;
- the grandparents or uncles/aunts of the adoptee, when the adoptees live with these family members; and
- the prospective adopter(s).

In certain cases, the court may waive the need for certain consents referred to above, namely of the parents of the adoptee, when judicially inhibited from the exercise of parental responsibilities.

Exercise of Parental Responsibilities Before Adoption

Since adoption in Portugal is only decreed when it presents real advantages for the adoptee (articles 36.º, no. 6, of the Portuguese Republic Con-

stitution and article 1974.º, no. 1, CC), adoptees are, as a rule, in situations of danger, due to orphanhood or serious violations of fundamental duties by their biological parents.

In such situations, children are often subject to protection measures, which may involve entrusting the child to the prospective adopting parents, under the terms of article 1978.º of the CC, in which case they obtain the parental responsibilities even before the adoption is decreed.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

Both case law and legal doctrine agree that the permanent move of a child to a new country must be qualified as a "matter of particular importance" (see **1.1 Parental Responsibility**).

As a matter of particular importance, international relocation requires the consent of both parents.

Consent regarding a matter of particular importance is never presumed by law, even during marriage or in a civil partnership. Therefore, when one of the parents seeks to decide alone a matter of particular importance, third parties must refuse to intervene (ie, obtaining the child's passport or habitual residency title).

2.2 Relocation Without Full Consent

If one of the parents does not consent to the relocation, parents may:

- resolve the issue through mediation; or
- settle the dispute in a court of law, through the special procedure provided for in article 44.º of the General Regime of Civil Guardianship Procedure (also called RGPTC).

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

To apply for relocation, the applicant needs to allege a disagreement between the parents on the child's country of residency and demonstrate that it is in the best interests of the child to authorise the relocation.

According to the many provisions of international law that bind the Portuguese State concerning children, such as the United Nations Convention on the Rights of the Child (UNCRC), as well as Portuguese-specific legislation, the determining factor in a proceeding concerning a child shall always be his or her best interests (as per article 3.º, no. 1, UNCRC, article 24.º, no. 2, Charter of Fundamental Rights of the European Union, also known as CFREU, and articles 4.º, no. 1, and 40.º, no. 1, RGPTC).

2.3.2 Wishes and Feelings of the Child

Legal Framework

The wishes and feelings of a child capable of forming his or her own views must be taken into consideration by judicial and administrative authorities in all matters affecting the child's life, including a relocation application. This results from:

- article 12.º, no. 1, of the UNCRC;
- article 24.º, no. 1 of the CFREU;
- articles 3.º and 6.º of the European Convention on the Exercise of Children's Rights;
- article 1906.º, no. 9, of the CC; and
- articles 4.º, no. 1, al. c) and 5.º of the RGPTC.

The Relation Between the Child's Opinion and the Child's Best Interests

This does not mean, however, that the court is bound by the wishes and feelings of the child. Instead, the child's opinion must be duly considered by the state authorities when assessing the child's best interests.

The child's best interests and the child's opinion may not coincide. In this sense, Portugal case law accepts and deems legal a decision against the child's wishes, even at advanced stages of his or her development, such as adolescence, so long as justified by the child's best interests (see decision of the Supreme Court of Justice dated 18 June 2024).

Children's Participation Rights as Fundamental Rights

The child's right to be heard, when he or she is capable of forming his or her own views, is qualified as a fundamental right.

As such, a state authority's decision not to hear the child must always be justified, according to the case's circumstances. Otherwise, the final decision in matters affecting the child will be null and void, as a result of the violation of the child's right (see decision of the Lisbon Court of Appeal dated 10 November 2022).

2.3.3 Age/Maturity of the Child

The Child's Ability to Understand the Matters Under Discussion

Rather than establishing a minimum age at which the child must be heard, Portuguese law prescribes that the child's ability to understand the matters under discussion must be assessed by the judge, according to the child's age and maturity (as per article 4.º, no. 1, al. c), RGPTC).

This is in line with article 12.º of the UNCRC, which prescribes the obligation to State Parties of ensuring the child's right to express his or her views freely, when capable of forming his or her own opinions.

Assessment of the child's ability to understand the matters under discussion

On a strict or literal interpretation of the law, this assessment should be the object of a formal decision, made on a case-by-case basis and with the assistance, if needed, of the court's technical consultants (article 4.º, no. 2, RGPTC).

Courts should, therefore, order the technical teams to interview the child or otherwise collect data (ie, school information, psychological reports, etc) that allow the evaluation of the spontaneity of the child's opinion.

However, first instance courts often hear the child without formally justifying their decision, often assuming that children over seven or eight years old are capable of forming their own opinions.

Exception: the Child's Best Interests

Even if the judge concludes that the child is capable of understanding the matters under discussion and forming his or her own views on such subjects, the court may still decide not to hear the child, if it is considered that it is not in the child's best interests to do so (as per article 35.º, no. 3, in fine, RGPTC).

This may be the case, for instance, where hearing the child places him or her:

- in a situation of conflicting loyalties with the remaining members of the family;
- under emotional and psychological distress; or

- in any situation harmful to his or her sound development.

2.3.4 Importance of Keeping Children Together

Although there is no legal rule establishing that siblings should be together, Portuguese case law gives high priority to this factor. Indeed, and despite case-law rules having no formal legal weight in Portugal, there are many legal dispositions that support the understanding that a close relationship with siblings is essential to the child's wellbeing and sound development (see, eg, articles 1887.º-A, 1979.º, no. 4, 1984.º and 1986.º, no. 3, CC).

However, similarly to the wishes and views of the child, keeping children together is not the determining factor for the decision, but rather one more relevant factor with which to assess the child's best interests. Therefore, an application for relocation that leads to a separation of children is not excluded a priori (see decision of the Lisbon Court of Appeal dated 21 March 2024, which decided to maintain a separation of siblings who had lived apart for some time).

2.3.5 Loss of Contact

When considering the best interests of the child, the possibility to keep a close relationship with both parents is one of the main factors to consider.

Under article 1906.º, no. 8, of the CC, it is established that the judge must always promote agreements or take decisions that favour broad opportunities of contact with both parents. Loss of contact with the left-behind parent is, therefore, one of the most – if not the most – common reasons to reject a relocation application, especially in cases where it is not possible to establish a visitation regime that sufficiently safeguards the relationship between the child and the left-behind parent.

Notwithstanding, the protection of the child's best-interests calls also for the consideration and protection of the child's relationship with the applicant-parent, who can in no way be penalised simply because he or she wishes to move to another country.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

In accordance with the recognition of the fundamental rights to free movement and to the free development of personality (articles 26.º and 44.º, Portuguese Republic Constitution), Portuguese courts, as a rule, do not assess the applicant's motives for relocation (see decision of the Guimarães Court of Appeal dated 4 February 2016).

Nevertheless, it will always be important to demonstrate that the reasons for relocation are legitimate, ie, more than a whim of the applicant, not aimed at hindering the child's relationship with the left-behind parent, etc (see Superior Court of Justice's decision dated 17 December 2019).

Among the most frequent reasons for relocation are the wish to return to the country of origin and professional aspirations.

2.3.7 Grounds for Opposition to Relocation

Considering that the child's best interests is the decision-making criterion par excellence, Portuguese courts will consider any ground for opposition deemed relevant to the child's wellbeing and development, including but not limited to:

- loss of contact with the left-behind parent and/or the child's extended family;

- the foreseeable impact that the change of cultural environment may have on the child;
- any foreseeable difficulties in the child's process of adaptation to the new country; and
- the child's current integration and school situation, etc.

2.3.8 Costs of an Application for Relocation

Court Fees

Parties in proceedings concerning children pay a court fee of EUR306, ten days after the final decision is made, regardless of whether it can be appealed (as per articles 6.º, no. 1, 7.º, no. 1, 13.º, no. 2, 14.º-A, al. g) and 15.º, no. 1, al. f) and no. 2, Portuguese Regulation on Procedure Costs, also known as RCP).

The same amount is due in case of appeal, ten days after the decision of appeal is made (articles 6.º, no. 2, 13.º, no. 2 a contrario and 15.º, no. 1, al. f) and no. 2, RCP).

Court Expenses

To these amounts are added any court expenses associated with the case (eg, translator fees, rogatory letters, medical examinations, etc) (articles 16.º et seq RCP).

Other Expenses

Although representation by a lawyer is not mandatory until the appeal stage, if one of the parties chooses to appoint one, he or she must bear the respective fees (unless he or she benefits from legal aid).

Furthermore, Portuguese law requires the translation into Portuguese and legalisation of foreign official documents, which can be particularly costly, especially if the documents were issued by countries that are not part of the European Union or signatories to the Hague Convention of 5 October 1961, abolishing the requirement of legalisation for foreign public documents (also called the Apostille Convention).

Likewise, all written communications with the court must be in Portuguese.

Reimbursements to the Other Party

Under the terms of the law, winning parties have the right to be reimbursed their expenses along with court fees and expenses, as well as a small compensation for lawyer fees, to be paid by the losing party (article 533.º, Portuguese Code of Civil Proceedings and articles 25.º and 26.º RCP).

In proceedings concerning children, it is not mandatory to appoint a lawyer until the appeal stage (article 986.º, no. 4, Portuguese Code of Civil Proceedings).

2.3.9 Time Taken by an Application for Relocation

Even considering that relocation cases are often granted urgent nature due to the sometimes imminent relocation of the applicant-parent, proceedings are usually time-consuming, taking between six months and a year and a half.

2.3.10 Primary Caregivers Versus Left-Behind Parents

Equal Parenting Principle

As referred to above, Portuguese law favours decisions that allow broad opportunities of contact between the child and both parents, as well as the sharing of parental responsibilities between them (as per article 1906.º, no. 8, CC).

Therefore, case law has increasingly abandoned the figure of the primary caregiver, favouring instead the principle of equality between both parents and the equal parenting principle.

The specific relevance of the primary caregiver in relocation cases

Nevertheless, since the child's best-interests criterion implies the assessment of the effect of the child's estrangement from both parents, courts continue to rule in favour of the primary caregiver in relocation cases, often arguing that the relationship with the other parent may be kept through recurrent contact through technological means and frequent travelling (see decision of the Guimarães Court of Appeal dated 19 January 2023).

2.4 Relocation Within a Jurisdiction

While relocation to another jurisdiction is always considered a matter of particular importance, and as such requires the consent of both parents, the classification of relocation within a jurisdiction as a matter of particular importance or as an act of everyday life will require a case-by-case analysis.

The criterion, according to the child's best interests, will be the impact of the relocation on the child's activities and routines, which as a rule depends on the distance between the place of residence and the location of the proposed move.

Thus, if the proposed relocation is to a nearby location, with little to no impact on the child's activities and routines, and allows the child to keep his or her relationship with the left-behind parent, the relocation will not require his or her consent.

On the other hand, if the relocation:

- compromises the alternating residency of the child with both parents;
- compromises the visitation rights of the non-resident parent;
- compromises the child's ability to attend the same school; or
- in any way impacts significantly the child's daily life and activities,

relocation will be qualified as a matter of particular importance and require the consent of both parents (as per II Jornadas de Direito da Família e da Criança – O Direito e a Prática Forense, pg. 33).

Relocation to a different, far-away place or between the mainland and the islands of the Azores or Madeira always represents a matter of particular importance.

3. Child Abduction

3.1 Legality

As referred to in **2. Relocation**, the removal of a child out of Portuguese jurisdiction by one of the parents, without the other's consent, is illegal. In fact, international child abduction implies the violation both of the child's and of the left-behind parent's fundamental rights, who are illegally deprived of contact with each other (as per article 36.º, no. 6, Portuguese Republic Constitution).

Criminal Relevance

Under article 249.º of the Portuguese Penal Code, child abduction is committed by a person who:

- removes the child from the sphere of control of whoever has custody – this can be done either by action or by omission (ie, refusal to disclose the child's whereabouts) and, as a rule, implies the lapse of a significant time period, sufficient to obstruct the exercise of parental responsibilities;

- by means of violence or threats of serious harm, causes a child to run away; or
- repeatedly and unjustifiably fails to comply with regime established for the child's residency/visitation rights in the exercise of parental responsibilities' regulation, by refusing, delaying or significantly hindering the child's handover or collection.

Although the crime seems to encompass situations of international child abduction by one of the parents, case law and legal doctrine have defended its inapplicability in cases where the exercise of parental responsibilities is not formally regulated.

It is also understood that the criminalisation of this behaviour does not fit criminal law's ultima ratio character and that these situations can be sufficiently sanctioned on a civil level.

The majority of international child abduction situations go, therefore, unpenalised, it being enough that the contact between the child and the left-behind parent is maintained, or that the child's whereabouts are known, for criminal courts to consider that no crime was committed.

3.2 Steps Taken to Return Abducted Children

Portugal is a Party-State of the United Nations Convention on the Rights of the Child and, as such, undertook to combat the illicit transfer and non-return of children abroad (article 11, no. 1, UNCRC).

Furthermore, Portugal is a country signatory to the Hague Convention on the Civil Aspects of International Child Abduction ("1980 Hague Convention") and a Member-State of the European Union, whose Council Regulation 2019/1111, of 25 June 2019 ("Brussels IIb Regulation"), introduces complementary rules on the application of the 1980 Hague Convention.

Therefore, and according to article 4 of the 1980 Hague Convention, the Convention shall apply when a child habitually resident in Portugal is removed to or retained in another country in breach of custody or access rights.

Steps to Return a Child Wrongfully Removed to or Retained in a Contracting State

Through the Central Authorities

In a situation in which a child is removed from Portugal, any person (including a parent), institution or other body claiming that the removal or retention occurred in breach of custody or visitation rights may apply to the Central Authority of any Contracting State for assistance in securing the return of the child, under the terms of article 8 of the 1980 Hague Convention.

Applying to the Portuguese Central Authority

Since March 2024, the Portuguese Central Authority is the "Direção Geral da Administração da Justiça" (or DGAJ).

One of its main purposes as a Central Authority for the 1980 Hague Convention is providing the necessary information and assistance to complete a child's return application, as well as obtaining the necessary documentation to instruct this request.

As such, on its website, DGAJ makes available various forms and information relating to the return application of a child removed from Portugal (see here and here).

Once the forms and documents are received by DGAJ, DGAJ will proceed to a technical analysis of the request and submit it to the Central

Authority of the State where the child is believed to be.

Costs of the application

For purposes of applying to DGAJ, it is not necessary to appoint a lawyer; however, this may be necessary once the application is transmitted to the Central Authority of the State where the child is believed to be. Applicants in situations of economic insufficiency may apply for legal aid, in the terms set out in **3.3 Hague Convention on the Civil Aspects of International Child Abduction**.

The filing of a return application with DGAJ is free of charge and the whole process may be done through a computer, eliminating the costs for postage and travel.

Furthermore, the Portuguese Central Authorities provide a translation of the necessary documentation in the official language of the State where the child is believed to be.

Steps to secure access rights

The steps described above may be taken in order to apply for the organisation and securing of access rights, when a child is removed to a foreign Contracting State.

DGAJ provides the forms for this request, as well as information on the necessary documents to instruct the application (see here).

Through Portuguese courts

Proceedings of return may be brought directly before Portuguese courts, in accordance with article 18 of the 1980 Hague Convention.

In fact, and despite the child's international abduction, Portuguese courts retain jurisdiction as the country of habitual residence of the child before the child's wrongful removal/retention, in accordance with article 9 of the Brussels IIb Regulation and article 7 of the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996 Hague Convention), of which Portugal is also a Contracting State.

A decision on the substance of rights of custody which entails the return of the child shall be enforceable in another EU Member State, in accordance with Chapter IV of the Brussels IIb Regulation, and articles 23 and 26 of the 1996 Hague Convention.

Steps to Return a Child Wrongfully Removed to or Retained in a Non-Contracting State

The wrongful removal or retention of a child in a Non-Contracting State of the 1980 Hague Convention leads to a very sensitive situation, in which the eventual return of the child is almost entirely dependent on the law of the Non-Contracting State.

Although it is possible to obtain a decision in Portugal regarding the parental responsibilities' regulation, which entails the child's return, as described above, the procedure for the recognition and enforcement of such a decision in the country where the child is may prove difficult or altogether impossible without an international instrument to ensure its automatic recognition and enforcement, such as the 1996 Hague Convention.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

Legal Advice

In Portugal, it is not mandatory to appoint a lawyer to present an application to the Central Authority, nor to the Portuguese court, except in case of appeal.

Please note that the Central Authority does not provide legal advice or representation, but only general information regarding the relevant laws, regulations and proceedings.

Notwithstanding, a parent may always choose to appoint a lawyer. In cases of economic insufficiency, parents can apply for legal aid and advice, on the same terms as citizens involved in any kind of legal process or seeking legal advice.

To apply for legal aid, a form must be submitted to the Portuguese Social Security, providing information on the applicant's income and assets.

Although this is a straightforward procedure, it is usually time-consuming, as it implies the evaluation of the economic situation of the applicant and communications between administrative authorities in order to appoint a state-paid lawyer (in fact, the state-paid lawyers are appointed by the Portuguese Bar Association), which is often incompatible with the urgency of return procedures and international child abduction situations.

Return Procedures Through Central Authorities

Upon receiving an application for the child's return from another Contracting State, DGAJ usually attempts to secure the voluntary return of the child, through consensus with the parent who wrongfully removed or retained the child in Portugal.

Should this attempt fail or prove impossible – for instance, because the true and current address of the abducting parent is unknown – DGAJ will forward the process to the competent public ministry's office, which may apply for a judicial return procedure or, if necessary, for the application of protection measures to the child.

Statistical information

Currently, DGAJ does not provide statistical information about the number of Hague cases and their outcome. Nevertheless, upon direct request it often shares information collected by the former Central Authority about the number of Hague cases received from other Contracting States.

Judicial Return Procedures

Hague Convention application

Despite acknowledging the Convention's underlying principle of immediate return of the child, Portuguese case law is sympathetic to the defences to the Convention, often defending broad interpretations of the exceptions provided in article 13.

The most common example is the relevance of the child's separation from the abducting parent. Since the latter is often qualified as the primary caregiver, the child's separation from this parent upon return is usually perceived as entailing a grave risk of physical or psychological harm to the child, under the terms of article 13, §1, al. b) of the 1980 Hague Convention (see a recent decision of the Portuguese Supreme Court dated 13 September 2022).

Furthermore, and even though the verification of an exception does not bind the court to refuse the child's return, there is, to our knowledge, no Portuguese decision that ordered the child's return despite the verification of an exception. On the contrary, its verification has always led to a non-return decision.

Proceedings

Portuguese law does not provide for a special proceeding for return applications, under the 1980 Hague Convention or otherwise.

As such, Portuguese courts use, as a rule, the common proceedings regulated by the Portuguese General Regime of Civil Guardianship Procedure, bestowing it with an urgent nature in order to meet the requirements of expediency and promptness arising from article 11, §1 of the Convention and article 24 of the Brussels IIb Regulation.

Rather than setting out a specific sequence of acts for ordinary guardianship proceedings, the legislation only established that "the judge may order the steps deemed necessary before issuing a final decision".

This naturally leads to a lack of uniformity in the processing of return applications, further decreasing legal certainty and security in a very stressful time for children and parents. Likewise, this undermines mutual trust between authorities, especially as Portuguese law does not provide for communication mechanisms with the court of the State of the child's residency.

Despite these disadvantages, it is indisputable that, even in the absence of a proper internal proceeding, courts must conform with the legal requirements of the 1980 Hague Convention and the Brussels IIb Regulation, as well as the guiding principles of guardianship procedures and civil proceedings, namely the principles of equality of arms and of the child's right to be heard (as per decision of the Supreme Court dated 14 September 2023).

Return procedures for a non-Contracting State

Even though the 1980 Hague Convention does not apply in such cases (article 4 of the Convention, a contrario), one of the aims of this international instrument is to secure the prompt return of children wrongfully removed to or retained in a Contracting State – a purpose that continues to apply, even if the abducted child is a habitual resident of a non-Contracting State.

Furthermore, and as referred to above, one of the undertakings assumed by the Portuguese State under the UNCRC is to combat the illicit transfer and non-return of children abroad.

In this sense, although no case law is available on this subject, it is our understanding that the same procedure and principles should be applicable whenever a non-Contracting State is involved, as follows from the principle of the primacy of the child's best interests.

Costs and timescale of return proceedings

Return proceedings are bestowed urgent nature, running terms even during judicial holidays, and must be decided within six weeks from the date of commencement of the proceedings (article 11, §2, 1980 Hague Convention and article 24.º, nos. 2 and 3, Brussels IIb Regulation).

Notwithstanding, the courts often struggle to reach a final decision within this timeframe, due to the steps taken to ensure the summons of the defendant, an adequate time for both parents to present their defence, the scheduling of a conference to hear the child (if the child is deemed capable of understanding the matters under discussion), etc.

To this end, Portuguese courts often use technical advisory services, in order to obtain infor-

mation on the child's ability to understand the matters under discussion, the child's integration in Portugal, his or her current state of mind and wellbeing, etc, which usually delays proceedings.

Return proceedings under the 1980 Hague Convention are not subject to the payment of court fees (article 26, §2, 1980 Hague Convention), although court fees may apply in case of appeal.

3.4 Non-Hague Convention Countries

Portugal is a signatory to the Hague Convention.

Trends and Developments

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The Child's Right to Express His or Her Views in Return Proceedings

Introduction and legal framework

The relevance of the child's opposition to being returned in the 1980 Hague Convention

As per article 13, §2 of the Hague Convention on the Civil Aspects of International Child Abduction (also known as the "1980 Hague Convention"), a judicial or administrative authority may refuse to order the return of a child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.

This is one of the few exceptions or defences to a child abduction application, releasing the courts of a Contracting State from the duty to order the return of a child proved to have been removed or retained away of his or her country of residence in breach of a custody right.

According to the Hague Conference on Private International Law's (HCCH) guidelines, the exceptions to non-return must be given a restrictive interpretation. This is a direct implication of the 1980 Hague Convention, which aims to ensure the prompt return of abducted children and to restore the status quo prior to any wrongful removal or retention. The reasons for these goals are multiple and include, among others:

- the defence of the child's best interests;
- the protection of the left-behind parent's custody and access rights; and
- deterring parents from attempting to influence the forum and the outcome of decisions relating to custody rights (or, in the Portuguese legal terminology, parental responsibilities), by artificially creating conditions that favour their own interests and not the child's best interests and welfare.

Child's opposition to return vis-à-vis child's right to express his or her views

The above may help explain the somewhat limited relevance of the child's opinion in the 1980 Hague Convention, especially when compared with other international Conventions, such as the United Nations Convention on the Rights of the Child (UNCRC) and the European Convention on the Exercise of the Rights of the Child (ECERC).

Indeed, while these Conventions recognise the child's right to be heard and to participate in judicial proceedings that concern him or her, establishing the duty of judicial authorities to take the child's opinion into account, the 1980 Hague Convention refers instead to the child's opposition to being returned and leaves it to the Contracting State's authority to decide whether or not to take the child's grounds for opposition into consideration.

Whether these differences are deemed appropriate in light of the 1980 Hague Convention, or merely as a symptom of a legal evolution initiated in 1989 with the UNCRC, which considerably broadened children's substantive and procedural rights, the fact remains that both European Regulations and Portuguese internal law have sought to introduce, in recent years, the child's right to be heard in return proceedings.

This short article aims to discuss the potential disadvantages of such a trend.

The introduction of the child's right to be heard in return proceedings by the Brussels IIb Regulation

On 1 August 2022, Council Regulation (EU) 2019/1111 of 25 June 2019, or the "Brussels IIb Regulation", became applicable in its entirety in all Member States of the European Union.

This Regulation is a recast of Council Regulation (EC) no. 2201/2003 of 27 November 2003, also known as the "Brussels IIa Regulation", and, like its predecessor, "establishes uniform jurisdiction rules for divorce, legal separation and marriage annulment, as well as for disputes about parental responsibility with an international element".

As far as parental responsibilities are concerned, both Regulations follow and develop the rules laid down in the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the "1996 Hague Convention"), with the exception of the ones concerning applicable law, a subject which has not yet been harmonised at the EU level.

One of the main new features of the Brussels IIb Regulation, when compared with the previous one, is the introduction of complementary provisions to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the "1980 Hague Convention"), applicable in international child abduction cases that involve EU Member States. These include, among others, the recognition of the "right of the child to express his or her views in return proceedings" (article 26 of the Brussels IIb Regulation).

According to this provision:

- Member States shall respect the child's right to express his or her views in return proceedings;
- to respect this right, Member States shall provide a child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, in accordance with national law and procedure; and
- when heard, the Courts of the Member States shall give due weight to the child's views, in accordance with his or her age and maturity.

Besides the extended scope of the child's right to express his or her views, vis-à-vis the relevance of the child's opposition to being returned, this complementary provision differs from the 1980 Hague Convention in two major aspects:

- There is no reference to the information relating to the social background of the child, as provided by the Central Authority or other competent authority of the child's habitual residence, which bore particular relevance under article 13, §3 of the Convention; and
- The HCCH's guideline that prescribes that the return should not be refused on the basis of an exception if the requesting State can provide for a safe return of the child does not apply to refusals under article 13, §2 (now broadened), but only to refusals based on point (b) of article 13, §1 (article 27 of the Brussels IIb Regulation).

The principle of the child's hearing and participation under Portuguese law

In accordance with Portuguese law and procedure, the child's right to express his or her views has the dignity of a general procedural principle, known in Portuguese legal terminology as "the principle of the child's hearing and participation" (article 4, no. 1, c), RGPTC).

According to this principle, a child who is capable of understanding the matters under discussion must always have the opportunity to be heard, preferably with the support of the court's technical advisory teams. The child's accompaniment by an adult of his or her choice is also

guaranteed, unless there are well-founded reasons for refusal – a rule which is a direct transposition of article 5, a) of ECERC.

In Portugal's case, this principle was already applied to return proceedings under the 1980 Hague Convention even before the Brussels IIb Regulation became applicable.

This is so because Portuguese law does not provide for a specific procedure applicable to return applications. In the absence of such a procedure, Portuguese courts typically apply the common procedure provided in the Portuguese General Regime of Civil Guardianship Procedure (RGPTC), which leaves it to the judge to order the steps deemed necessary before issuing a final decision.

Despite this apparent freedom, when deciding which steps are necessary, in Hague return proceedings or otherwise, judges must comply with common procedural principles, as well as the principles set out in RGPTC, which include the principle of the child's hearing and participation.

Assessing the child's capacity to understand the matters under discussion

In order to determine whether or not a child has sufficient understanding, judges must perform a case-by-case analysis; to do so, they may use the court's technical advisory teams (article 4, no. 2, RGPTC). As such, it is not enough, according to the law, to consider the child's age and maturity in the abstract. Instead, such factors must be weighed alongside the other information available in the case files, including, among other things:

- the complexity of the matter under discussion;
- school or psychological reports;
- the parents' written or oral statements concerning the child's maturity and ability to understand matters affecting the child's life; and
- the technical opinion of the court's advisory teams, which often interview the child before his or her hearing in court.

Portuguese courts often bypass this assessment, directly ordering the child's hearing, even at very young ages. They do so both to avoid the difficulties inherent to the evaluation of the child's ability to understand the matters under discussion, but also to avoid the legal consequences of not providing the child the opportunity to express his or her views, which can result in the nullity of the final decision.

The relevance of the child's views in return proceedings

Notwithstanding its major importance as a legal fulfilment of the child's procedural rights and right to the free development of personality, the relevance of the child's views in return proceedings may be particularly problematic in return proceedings, under the framework of the Brussels IIb Regulation and Portuguese law.

The child's views vis-à-vis the child's opposition to being returned

The child's right to express his or her views, recognised in the UNCRC, the ECERC and Portuguese law, has a different and broader scope than the "child's objection to being returned", used in the 1980 Hague Convention.

To illustrate the above, we selected the decision from the Évora Court of Appeal dated 4 June 2020. In this case, concerning a Ukrainian child of 12, the decision of the first instance court, which ordered the child's return, was annulled by the Court of Appeal, on the grounds that nothing

was said in the decision about the views and wishes expressed by the child.

According to the summary report of the case files, upon his hearing, the child stated that "he had gone to the sixth grade, but he had not passed; he likes to be in Portugal a lot; he wishes to go to Ukraine in the holidays, to visit his family, but only with his mother; he lives with his mother and brother; he doesn't miss his father" (freely translated).

These declarations do not contain a direct opposition to his return, but merely a preference for staying in Portugal. Furthermore, the child did not provide an objective reason for his preference or for his wish to stay in Portugal with his mother and brother.

Notwithstanding, the court of appeal considered that "the decision to order the return [of the child], following wrongful removal to or retention in one of the Contracting States, requires an examination of whether the return corresponds to the child's best interests or even whether it is in accordance with his or her will, provided that the child's age and degree of maturity justify his or her opinion being taken into account" (freely translated).

The Évora Court of Appeal decision goes on to say that "a child's expressed wish to remain in the country to which he or she has been removed and is being retained must also take into account the child's maturity, as established in the 1980 Hague Convention. It is not enough for a child to express that he or she wishes to remain in the contracting state to which he or she has been unlawfully removed or retained. It is necessary that this wish demonstrates a sufficient degree of maturity and that the decision not to return is based on the child's best interests" (freely translated).

The above results, in sum, in the following:

- the relevance of the child's preference to stay, whereby that preference is considered as a form of opposition, for the purposes set out in article 13.º, §2 of the 1980 Hague Convention;
- the relevance of the child's degree of maturity, as a criterion to know whether the child's preference to stay must be taken into account; and
- the relevance of the child's best interests, which are introduced as the judicial criterion to know whether the child's preference to stay must be attended to or if the return must be ordered against his or her wishes.

This case law, which results in a significant expansion of the scope of application of the exception provided for in article 13, §2 of the 1980 Hague Convention, invites considerations which, due to their close relation with the merits of the right of custody, should be within the exclusive competence of the courts of the State of habitual residence.

Indeed, the assessment of whether it is in the best interests of the child to stay or return will necessarily intersect with the discussion on the child's country of residence, for which the courts of the requested State lack international competence (as per article 9 of the Brussels IIb Regulation and article 8 of the 1996 Hague Convention). Likewise, in the original spirit of the 1980 Hague Convention, the exceptions to return refer only to extreme situations, and not to the assessment of whether or not the return decision is in the child's best interests, which the courts of the

child's country of habitual residence are better placed to assess.

Notwithstanding, this or similar understandings have been adopted by Portuguese courts in return proceedings.

The Oporto Court of Appeal, for instance, wrote in the summary of a 2022 decision that "when assessing whether the exception provided for in article 13(b) of the [1980 Hague Convention] is met, a judgement must be made as to whether the child's return is in his or her best interests or even his or her wishes (provided that the child is of age and maturity)" (freely translated).

In another example, a Supreme Court decision of 2021 considered legal another decision by the Oporto Court of Appeal to refuse the return of two children who expressed a preference to remain in Portugal with the father, although the children described a positive relationship with both parents and explained that the reason why they were upset with the mother was because she had initiated a romantic relationship with another person. According to this decision, even if it was proven that "the children adhered to the father's point of view, because he expressed sadness" (freely translated) and that "the children are incapable of distinguishing between conjugality and parenthood" (freely translated), the appealed decision is admissible, as the children's objection is a legal ground to refuse to order the children's return and the Court had made "a global consideration of the children's best interests, concluding that its promotion would be greater if they remained and resided in Portugal" (freely translated).

The difficulties in assessing the spontaneity of the child's views

One of the most difficult aspects of the child's hearing is to assess whether the child's views are unduly influenced by one of the parents and/or by an incorrect comprehension of his or her reality. This is particularly true in return proceedings, due to the complexity of the matter and to the publicity given to the child's views as a defence to a return application.

The child's hearing in these proceedings can pose terrible risks for the child's welfare, often leading to the weaponisation of young children and to a court giving weight to a child's false or misguided understanding, leading to consequences for his or her return, against the child's best interests.

For this reason, it is important to pay close attention to inconsistencies in the child's speech, which can be the result of undue influence by an adult or of a loyalty conflict felt by the child. However, even this may not be enough, as such influence or conflict may not be apparent from the child's declarations.

The weight of the child's relationship with the abducting parent

As illustrated by the Évora Court of Appeal's decision cited above, the child's relationship with his mother assumed, for the child, a particular importance, which intertwines with the child's supposed preference to stay outside of his country of habitual residence.

In this sense, it is often anticipated that return will lead to the child's estrangement from the abducting parent, to whom the child has usually grown closer during the time of the wrongful retention, as well as a sometimes unwanted rapprochement with the left-behind parent,

from whom the child has grown apart. There is, therefore, a "fear" of return, often fuelled by the abducting parent, which vitiates the child's volitive and cognitive process.

This fear, however, does not originate from the child's opposition to being returned but rather from the abducting parent's decision not to do so. Thus, and although the will of the abducting parent has no legal relevance, it becomes relevant under the guise of the "child's wish to stay" or the "child's best interests", especially when such concepts are used to prevent the child's estrangement from the abducting parent, who is often qualified as his or her primary caregiver.

The lack of information from the authorities of the State of the child's habitual residence

Due to the absence of special procedural rules for return proceedings, Portuguese courts are unequipped to request information on the child's social background from the Central Authority of the child's habitual residence, as provided for in article 13, §3 of the 1980 Hague Convention.

As an alternative, courts often resort to their own national advisory teams. Although this option may be deemed legitimate in the framework of the Brussels IIb Regulation, which refers to the national law of each Member State, it may lead to decisions based on wrong or incomplete premises.

In this sense, national technical teams only assess a short period of the child's life, which gives an inaccurate picture of the child's background that is often very different from the reality the child knew before the abduction.

Furthermore, the circumstances in the State to which the child was wrongfully removed can easily be artificially controlled or influenced by the abducting parent, thus rendering the 1980 Hague Convention ineffective. Simultaneously, the information gathered is often unverified, allowing courts to take into account false or misleading information provided by the parents or the child.

In conclusion

Notwithstanding the paramount importance of the child's right to express his or her views, its relevance in return proceedings can have inauspicious consequences when leading to decisions that consolidate the de facto conditions created by the abducting parent and ultimately to the child's estrangement from the left-behind parent, against his or her best interests.

This jeopardises the 1980 Hague Convention's purposes of preventing parental international abduction, providing abducting parents with a sense of impunity, especially considering that under Portuguese law parental abduction is not considered a crime, when parental responsibilities are not properly regulated.

SINGAPORE

Trends and Developments

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Rajah & Tann Singapore LLP has a family law practice that has been ranked by a pre-eminent family law guide for family & divorce law firms in Singapore since 2016. Recipients ranked by the guide are nominated and selected by the legal fraternity in recognition for their expertise and capability. The firm's partners' standing and reputation in the market make the firm sought after for family and matrimonial legal advice. Rajah & Tann Singapore's team comprises specialist lawyers who provide a one-stop-shop of personalised legal service to fulfil a wide array of legal needs. The firm draws on an exceptionally strong commercial litigation team capable of handling all types of family and matrimonial disputes. Rajah & Tann Singapore has many ranked departments and lawyers in legal ranking guides of Chambers and Partners.

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Recent Developments in the Law on International Relocation of Children in Singapore

In the last few decades, Singapore has become home to expatriates who have chosen to stay here for some time, whether for work, education or other reasons. For these families choosing Singapore as a home (whether permanently or temporarily), there are few areas of law that would impact their lives more significantly than the law on international relocation of children.

The law on international relocation of children in Singapore has similarly advanced alongside this trend. Singapore acceded to the Hague Convention on the Civil Aspects of International Child Abduction in 2010 to provide an avenue for the prompt return of children wrongfully removed from Singapore and resolution of such transborder custodial disputes. Where parties are unable to agree on relocation issues, they avail themselves to the Singapore courts to make a determination on the issue of relocation, which has resulted in the development of case law and principles on relocation.

This article seeks to provide an overview of the significant case development in Singapore on the international relocation of children in the last decade since the seminal Court of Appeal decision of BNS v BNT in 2015, and provides some guidance for legal practitioners advising their clients based in Singapore on international relocation of children.

Pre BNS v BNT: The wishes of the relocating parent as a focal point

Prior to BNS v BNT, the Singapore Courts were more likely to allow the relocation of children with the custodial parent so long as the party relocating was reasonable in their conduct, and their wishes did not interfere with the welfare of the child. The primary focus then was on the wishes of the relocating party than the other factors.

Re C (an infant) ("Re C") elucidated this judicial attitude. In this case, the father of a child was imprisoned for the homicide of the mother. The Court of Appeal granted custody and care and control to the child's maternal grandparents who lived in Australia. The child was thus required to relocate to Australia. The Court of Appeal considered as determinative the following two factors:

- 1. the reasonableness of the custodial parent's wishes in relocating the child; and
- 2. the welfare of the child.

That said, in Re C, the Court's primary consideration was whether the request to relocate by a custodial parent was reasonable. Where it is not done in bad faith or not unreasonable, the Singapore Courts would allow the relocation application unless the child's interests are incompatible with the intended relocation.

An analysis of the cases applying the principle in Re C shows the trend of the Singapore Courts considering as primary the desire of the primary caregiver to relocate.

1. In AZB v AYZ, the High Court affirmed the lower Court's decision to allow an application by an American mother (who was the primary caregiver of the child) to relocate to the US after her marriage with her Malaysian husband broke down. In holding as such, the High Court made clear that "in most cases where the desire of the primary caregiver to relocate is reasonable and genuine, the court is likely to grant the application".

2. Similarly, in AYD v AYE, the High Court affirmed the lower Court's decision to allow an application by a mother, who was found to be the primary caregiver, to relocate to the US with her children following divorce. The High Court considered the issue of the non-custodial husband's access to the children as a separate matter, holding that "any hindrance or further hindrance to his access must weigh less than the children's interest in being with their mother".

It was hence more likely for the Singapore Courts to allow relocation of children with the custodial parent so long as the wishes of the party relocating were reasonable, and their wishes did not interfere with the welfare of the child. This indicated a preference to consider the wishes of the relocating party to a greater extent over other considerations and factors.

BNS v BNT: Realignment of the child's interests as the paramount consideration, with a renewed focus on the non-custodial parent's relationship with the child

BNS v BNT signalled a marked shift in the judicial attitudes towards applications for relocation of children. In BNS v BNT, the parents were Canadian citizens who married in Canada and then moved to Singapore with their two children. The court ordered interim joint custody to the children and interim care and control to the mother in the divorce proceedings. However, the mother's application to relocate to Canada with the children was dismissed.

Under the Re C approach, the mother's desire and wishes to relocate with the children would have persuaded the Singapore Courts to grant the relocation application. However, BNS v BNT recontextualised past cases by making clear that there is no legal presumption that relocation would be allowed where a primary caregiver's desire to relocate is not unreasonable or founded in bad faith, ie, the principle expounded in Re C. Rather, the Court of Appeal considered that the only applicable principle of law is that "the welfare of the child is the paramount and overriding consideration". This pronouncement in BNS v BNT aligns itself with the English position in the seminal decision of Payne v Payne, as contextualised in K v K (Children: Permanent Removal from Jurisdiction).

In BNS v BNT, the Court of Appeal considered the non-relocating parent's close ties to the children, and the likelihood of a future relationship between the children and the non-relocating parent, in determining that relocation would not be in the children's best interests. This stands in great contrast to AYD v AYE and AZB v AYZ, and demonstrates the holistic exercise which the Singapore courts would undertake when assessing whether relocation would be in a child's best interests.

Following BNS v BNT, there appeared to be heightened focus on the preservation of the non-relocating parent's relationship with the child in its assessment of a relocation application.

1. In TAA v TAB, the High Court dismissed a custodial parent's application to relocate with the two older children to Spain with his new wife and child from a subsequent marriage. Multiple factors were considered, such as the non-custodial parent's relationship with the children, and the children's ties to Singapore (such as schooling). However, while much emphasis was placed on the children's wellbeing, the loss of the non-relocating parent's relationship with the child presented itself as a significant consideration in the High Court's eventual decision to dismiss the application.

2. In TOG v TOH, the Family Court ordered the return of a child who was removed by the mother from London back to Singapore. In so holding, the Family Court considered the guidance in TAA v TAB that a relocation of a child would "mean a fundamental change in whom the children would see as their close family" and that sufficient weight must be given to the loss of such relationship.

It is evident, following BNS v BNT, that the loss of the non-relocating parent's relationship with the child became a significant factor in the Court's assessment of whether relocation was in a child's best interests. This marked a complete pendulum shift from the wishes of the custodial parent to the interests of the non-custodial parent.

Post BNS v BNT: Child's best interests as paramount consideration, with a holistic assessment of all relevant factors

However, recent cases shows a recalibration of the Singapore courts' approach towards the assessment of a child's best interests. The Singapore courts now undertake a holistic exercise to weigh and determine various factors in its assessment of whether relocation would be in a child's best interests. Some of such factors include (but are not limited to) the following:

- wishes of the parents;
- wishes of the child;
- loss of relationship with left-behind parents;
- age of the child;
- well-settledness of the child in the country;
- connecting factors to the country;
- immigration status of the parent/child to continue to remain in the country and/or the desired place of relocation;
- family support, resources and opportunities available to the child and the relocating parent;
- parenting plan for the child upon relocation;
- provision access and contact time, both physical and remote, for the left-behind parent; and
- needs of the child, including education, special needs or health concerns.

This shift can be traced back to the Court of Appeal decision in TSF v TSE, where the Court of Appeal reversed the High Court's decision and disallowed a mother's application for a child (who is diagnosed as having Autism Spectrum Disorder) to be returned to her in England. The Court considered the relationship that the child had with the mother on the one hand, and the father and grandparents on the other hand, to be a neutral factor. Instead, the Court considered the following factors to weigh in favour of the father (and hence, for the child to remain in Singapore):

- the loss of the support system that the child had been enjoying, which had been his source of emotional support;
- the lack of details on the adequacy of the facilities and the network available for the child's development in England;
- the uncertainty of the mother's employment and ability to provide materially for the child; and
- the difficulties that the child would face adjusting and adapting to a new environment should relocation be allowed, and consequently, the need for stability.

Since TSF v TSE, the Singapore courts have engaged in the same rigorous and holistic assessment of a child's welfare when determining the issue of relocation. Recent cases show

a shift away from the idea of either prioritising the relocating parent or the non-relocating parent's wishes. Instead, other factors that directly concern the child's welfare such as his/her ability to obtain citizenship benefits, the settledness of a child, and the ability for the child to maintain a good relationship with both parents, are considered.

1. In UYK v UYJ, the High Court allowed an application by a mother to relocate with a child to the UK. In this case, the father and mother (who were not legally married) signed a Joint Letter of Intention stating that in the event of the breakdown of the relationship, the mother would be the primary caregiver of the child and that her intention was to return to the UK with the child. The High Court considered that the well-settledness of a child in a country had to be analysed alongside other related circumstances, such as "how many years the child has lived in that country, the age of the child, and whether that country has been the family's home for many years". Given that this case happened during the COVID-19 pandemic period, the High Court took the opportunity to clarify that relocation orders should not be determined depending on the COVID-19 situation at each specific point in time, given how the orders "would quickly become outdated as the global situation changes".

2. VPG v VPF and another appeal, concerned Indian citizens who had recently moved to Singapore with the child so that the mother could seek medical treatment. Upon divorce, the father applied to relocate to India with the child. A main factor for the Court granting the father's relocation application was the family's lack of connection to Singapore, as well as the care and support the relocating parent would enjoy in India from his extended family.

3. Similarly, in VJM v VJL and another appeal, the High Court upheld the lower Court's decision to allow the mother to relocate with her child to the US. The Court held that the family's lack of connection to Singapore was one of the "strongest factors" in favour of relocation (given that the parties were in Singapore with temporary immigration statuses). However, the Court also considered the father's willingness to relocate to the US as pointing more favourably towards relocation, as this would mitigate any potential loss of the parent-child relationship.

4. More recently, in WRU v WRT, the High Court reversed the lower Court's decision and allowed the mother to relocate with her children to the US where her new partner was residing. The holistic nature of the Court's assessment in determining the issue of relocation can be seen by the Court considering the following:

- the mother's desire to relocate and its impact on the children (a factor which took primacy in the Re C period);
- the wishes of the children to relocate;
- the loss of the relationship between the non-relocating father and the children (a factor which featured in the BNS v BNT period), albeit the Court finding that the father-children relationship was poor in recent months arising from the father's conduct around the children and his preventing them from relocating; and
- the harm to the children if they were not allowed to relocate.

WRU v WRT encapsulates the multi-factorial approach that the Singapore courts has adopted in recent years, when determining whether relocation is in the best interests of the children. Interestingly, with the adoption of this holistic approach and multifactorial analysis, the Singa-

pore Courts have been more open to consider relocation applications in the context of the welfare of the child, with no factor taking precedence over another. Ultimately, the analysis of the child's best interest is a fact-sensitive one.

It is hence the authors' views that every relocation application would have to be thought through the lenses of the welfare of the child and its potential impact to the child, with adequate plans put in place to mitigate the impact of relocation. This is expected of any parent who makes an application for relocation. These include the following.

1. A clear parenting plan should be devised from the onset of the application, with steps taken to enquire and secure accommodation, schooling, and childcare for the child, and stated clearly in any relocation application. Such plans should also take into account any development needs of the child, for which plans should be made to mitigate any potential problems for the child post-relocation.

2. A clear post-relocation access plan should be devised to mitigate as far as possible the possible loss of relationship between the non-relocating parent and the child, including generous physical and remote access to the child. A relocating parent also needs to be attuned to the fact that he/she plays a crucial role in ensuring the preservation of the bond between the non-relocating parent and the child, and that active steps have to be taken to facilitate such access.

Given how the Singapore Courts have repeatedly reiterated the welfare of the child as the "golden thread" running through all proceedings directly affecting the interests of children, it would serve family law practitioners well if they adopted a child-centric, multi-factorial approach to help their clients consider how the best welfare of their child can be preserved and protected whenever relocation from Singapore becomes necessary.

SPAIN

Law and Practice

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Arbáizar Abogados is an independent law boutique focused on the international aspects of family law and law of succession, and it ensures it keeps updated on international legislation, case law and practices. Its lawyers are expert family mediators and collaborate closely with tax advisers, practising civil law, family law, law of succession, criminal law and public law. The firm operates nationwide through its office in Málaga and its network of collaborating firms and connections spans the globe, allowing it to plan and resolve legal issues in a wide range of different jurisdictions. The personal relationships and trust it has with its clients are critical to the firm.

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

In Spain, a parent's decision-making power is known as *patria potestad* and is defined as "parental responsibility", always exercised in the children's best interest according to their personality and respecting their rights and physical and mental integrity. This function comprises the following duties and rights:

- to take care of them, accompany them, feed them, raise them and provide them with a comprehensive education; and
- represent them and manage their properties.

Parental responsibility is explained in Article 154 of the Civil Code and therefore all main decisions related to the child's life, such as medical and psychological treatments, the school the child is enrolled in, religion issues, etc, must be agreed by both parents.

Article 156 of the Civil Code states that both parents have the same parental responsibility and they must agree on these matters concerning their child. In case of dispute, any parent can issue an urgent proceeding and the judge, after having heard both parents and the child (mandatory for children older than 12 years), will render an order stating which parent can decide in the specific matter. If the parents' disagreements continue, the court can order that one parent will have the decision-making power regarding the child's wellbeing, but not for a period longer than two years. Setting the child's place of residence is a parental responsibility matter under Article 156 of the Civil Code.

The proceeding under Article 156 of the Civil Code on parental responsibility disputes is a quick and urgent proceeding that will be heard in a couple of months. In some cases the court can consider that international child relocation is a very important matter and will invite both parents to file a child's internal relocation application issuing normal proceedings on family matters that usually take about one year.

It is really exceptional to be deprived of parental responsibility; the common scenario is to stop contact with the children, but in cases of neglecting the care of the children, not fulfilling the duties of Article 154 of the Civil Code, committing domestic abuse upon the spouse or/and children, etc, one parent or both of them can be deprived of parental responsibility by a court order according to Article 170 of the Civil Code.

1.2 Requirements for Birth Mothers

The birth mother does not have to meet any requirement to obtain parental responsibility. She will obtain parental responsibility by operation of law, when her name is inscribed on the child's birth certificate.

1.3 Requirements for Fathers

The father will obtain parental responsibility by operation of law as soon as his name is inscribed on the child's birth certificate. If the parents are not married, the father must complete a form at the Civil Registry requesting to be inscribed as the child's father on the child's birth certificate, with the mother's consent.

In the absence of the mother's consent, the father will have to file at court for parentage proceedings. There is a deadline of one year, since the father knew that the child had been born.

1.4 Requirements for Non-genetic Parents

A non-genetic parent requires a court order in order to obtain parental responsibility.

Surrogacy is illegal in Spain, but the foreign court order that grants parental responsibility to a surrogated father or mother can be recognised by the Spanish courts to protect the best interest of the child that has been born by surrogacy abroad.

If the parents are married and only one of them is the surrogated father or mother recognised in the court order, the other spouse can adopt the child born by surrogacy abroad.

1.5 Relevance of Marriage at Point of Conception or Birth

There is a legal presumption that the husband is the father of the child, according to Article 116 of the Civil Code. Unmarried parents are equally treated as married parents in relation to parental responsibility.

1.6 Same-Sex Relationships

The process of obtaining parental responsibility is not different in circumstances where the parents are in a same-sex relationship. The parents will have to meet the requirements of non-genetic parents or adoptive parents. Spain recognises adoption by same-sex couples.

1.7 Adoption

At least one of the adoptive parents must be older than 25 years of age and the age gap between the adoptive parent and the child must be between 16 years and 45 years. The adoptive parents must obtain a certificate of suitability.

A child older than 12 years must consent to the adoption, as must their genetic parents if they have not been deprived of parental responsibility for their child.

The court order will grant the adoptive parents parental responsibility in the child's best interest.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

Both parents must consent to the child's international relocation; it is advisable to have written consent.

In case of disagreement, the court of the child's habitual residence must render a court order authorising the international child's relocation.

2.2 Relocation Without Full Consent

The requesting parent must lodge a petition to obtain the child's international relocation authorisation by the court. Parental responsibility and child custody proceedings will be issued and the relocation will be resolved by a court order. Relocation will be heard in a modification of children's arrangement proceedings, if an order on parental responsibility has already been rendered by the court.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

The child's best interest is paramount. The age of the children, wider family support in the new country, better education opportunities and whether there will be a better standard of living in the new country will be taken into account. The relocating parent's application must be fair, well grounded and not based on selfish reasons. The left-behind parent and child contact must be

protected. The Supreme Court Judgment (*Sentencia del Tribunal Supremo* (Civil), sección 1ª, 20.10.2014, No 563/2014) set a new case law precedent: "the international relocation of the custodian parent can be ordered only in the best interest of the minor child under his/her custody, whom the child will relocate with".

2.3.2 Wishes and Feelings of the Child

Children are heard by the judge according to their age and maturity and it is mandatory for children older than 12 years old. The Judgement of *Tribunal Supremo* (Civil), sección 1ª, 19.10.2021, No 705/2021 authorises the international relocation of two teenage siblings, based on the fact that, when they were heard by the court, they expressed their will to move to Varese, Italy, with their father.

2.3.3 Age/Maturity of the Child

The wishes and feelings of the child can be a determining factor when the children are older than 12. It is also important that the child's answers shows maturity and independence, free of any parental influence.

2.3.4 Importance of Keeping Children Together

Keeping the children together is paramount in Spanish Supreme Court case law. The general rule is to keep siblings together; it is exceptional and must be very well legally grounded to separate the children between the father's and the mother's custody. The children must be heard according to their age and maturity and it is mandatory when they are older than 12 years old.

2.3.5 Loss of Contact

Relocation will not be granted if the court realises that its purpose is the loss of contact between the child and the left-behind parent. A lot of weight is placed on the fact that relocation would mean a loss of contact between the child/children and the left-behind parent. The main factor is the left-behind parent's behaviour with the children prior to the application. If the left-behind parent had a very close relationship with their children, it will be difficult to obtain the international relocation. If the left-behind parent was not involved in bringing up the child and taking care of them, spending time together, etc, it will be easier. It is also important to take into account the distance and connections between the left-behind parent's place of residence and the child's relocation place.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

The best interest of the child is paramount; taking into consideration the wishes and feelings of the child according to their age and maturity. The reasons for relocation should be fairly grounded and not selfish, and wider family support in the new country should be considered. There should be fair contact between the child and the left-behind parent and it should be considered whether there are bonds and ties with the new country, such as: parent's nationality, child's nationality, whether they speak the language of the country, enjoy its culture, etc. Better job prospects for the relocating parent should also be considered.

2.3.7 Grounds for Opposition to Relocation

The court will be sympathetic to the non-applicant parent when the court realises that the relocation's purpose is the loss of contact with the left-behind parent, or when the relocation application is not based on the child's best interest. Other considerations are if the relocation petition is based in selfish and capricious motives; if the child will be relocated to a new country without any bonds to the child, that is without a wider

family support; if the child does not speak the language; or neither the relocating parent or the child are nationals, etc.

2.3.8 Costs of an Application for Relocation

The costs will be the attorney and the *procurador* fees. The *procurador* is a private court's clerk that must represent the party at court by law. In respect of private reports, the courts have forensic psychologists that can produce a report on the suitability of the child's relocation abroad. This forensic report, which is ordered by the court, is free.

2.3.9 Time Taken by an Application for Relocation

It is difficult to estimate the time taken by an application for relocation because it differs from court to court, but it would generally be about one year. In a case where the forensic report is requested by any parent, it will take much longer because the forensic psychologists are overloaded with family cases. A private psychological report can be obtained quite quickly. If a party is not happy with the court order, they can appeal to the Higher Court. The appeal will take another year.

2.3.10 Primary Caregivers Versus Left-Behind Parents

The court is more sympathetic to the primary caregiver.

The Supreme Court Judgment (*Sentencia del Tribunal Supremo* (Civil), sección 1ª, 20.10.2014, No 563/2014) argues that: "The question is the suitability for the child to relocate abroad, which may entail a radical change in his social and parental environment, with adjustment problems. If the international relocation affects the best interest of the child, it might bring a change of the child's parental custody. The best interest of the child is paramount in relocation cases, of a perfectly specific child, and not of a Spanish national, as a factor to be protected to dismiss the child's relocation. It is important to check if the child is better under the mother's or the father's custody. The security and stability that the mother provides to the child is not guaranteed with the mother's and child's stay in Spain. It is not possible to oblige the mother to live in a country which is not hers, and in a family environment which is neither the child's (…); the protection of the children's right does not necessarily imply to be detrimental to the parent's right."

In this case, the non-custodian father was not involved in raising his son, and neither was his family; that is the reason why the court decided that it was not fair not to let the mother relocate to Brazil with the child, where the child and herself would have wider family support than in Spain.

The Supreme Court ordered the child relocation to Brazil based on the following.

- "The mother has all her family in Brazil, not only parents and siblings, but also another son, 17 years old.
- The father has a bad relationship with his family in Spain, therefore his family and close friends environment is not sufficient to take care of the child if he finds a job.
- The father and child contact is protected with a fair and balanced share of the journey's costs."

The Supreme Court set a new case law precedent: "the international relocation of the custodial parent can be ordered only in the best interest of the minor child under his/her custody, whom the child will relocate with".

2.4 Relocation Within a Jurisdiction

Internal relocation orders are more common. The factors taken into account by the court to make a decision on a child moving to a different part of Spain are: the child's best interest; the distance between the former and new residence which would facilitate the other parent to meet the child; better employment opportunities for the parent who wants to move, as well as wider family support in the new place.

The main ground to allow relocation in Spain is a better job with better financial prospects for the custodial parent when the earnings of the left-behind parent are not relevant and it would provide a better standard of living to the children.

Other factors are the distance between the left-behind parent and the new home, the existence of wider family support in the new residence, etc.

3. Child Abduction

3.1 Legality

It is unlawful to take a child out of Spain without both parents' consent. The left-behind parent can issue Hague Convention proceedings to request the return of the child to Spain at the family court of the country where the child has been abducted.

Spanish criminal courts usually request that, if a child was abducted in breach of parental responsibility through a court order, the removal from the jurisdiction be considered a crime in terms of Article 225 bis *Código Penal*.

If there is a real a risk that the common child can be abducted out of Spain, it is advisable to apply for the very urgent measure proceedings of Article 158 of the Civil Code to forbid the child to leave Spain, without the judge's authorisation, and to retain the child's passport at court. The court will order the Spanish police to check that the child does not leave Spain and that the child cannot get a passport.

3.2 Steps Taken to Return Abducted Children

If a child has been removed from Spain without the relevant consent, the left-behind parent must immediately inform the Spanish Ministry of Justice to issue a return application proceeding of the Hague Convention. The Spanish Ministry of Justice is the Spanish Central Authority, which is located in Calle San Bernardo, 62 in Madrid (E-28071), email: sustraccionmenores@mjusticia.es, telephone: +34 91 837 22 95.

A child's return application must be also lodged in the country where the child has been abducted. In case the child has been taken to a country which is signatory to the Hague Convention, the Central Authority of the country must be engaged to co-operate in returning the child to their habitual residence.

It is also recommended to file a petition to formally declare the unlawful removal of the child at the Spanish court of the child's habitual residence. The proceeding to declare the unlawful removal of the child from Spain is explained in Article 778 quáter of the Law of Civil Procedure.

If the child was abducted in breach of a court order on parental responsibility, a criminal complaint can be filed at the Spanish police to obtain Interpol co-operation in the country where the child has been abducted, in accordance with Article 225bis of the Criminal Code.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

Spain is signatory to the 1980 Hague Convention.

- The Spanish Central Authority will provide free legal advice to the parent of the abducted child. The parent of the abducted child will be legally represented at court by a civil servant lawyer appointed by the Central Authority. The public prosecutor (*Ministerio Fiscal*) will be part of the proceedings to defend the child's best interest.
- The rule is that Spain applies the underlying principle of the Hague Convention of the immediate return of the child. Children's return applications are dealt with quite efficiently by the Spanish courts. The family court of the child's residence will have jurisdiction.
- If the child has been abducted to a non-Convention country, the left-behind parent must immediately inform the Spanish Ministry of Foreign Affairs and the Spanish Embassy in that country. A child's return application must be lodged in that country according to its law. A local lawyer in the non-Convention country must be engaged to represent the left-behind parent at the court of the country where the child has been abducted. If a criminal complaint has been filed in Spain, Interpol co-operation must be engaged.
- The parent of the abducted child will be represented at the Spanish court by a civil servant lawyer and therefore will not have to pay any expenses. The average time scale for applications under the Hague is about three months, with the appeal to the Higher Court (*Audiencia Provincial*) included.

3.4 Non-Hague Convention Countries

Not applicable as Spain is a signatory to the Hague Convention.

Trends and Developments

Contributed by:
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MayteGarcia International Family Law is a Spanish boutique family law firm specialised in international family law and child protection. With offices in Madrid and Málaga-Marbella, Mayte Garcia heads a team of lawyers who provide bespoke advice to international clients with residence or family interests in the Marbella/Sotogrande area on family law, divorce, division of assets located in different jurisdictions, and children-related cases, among others. The firm has a long record in collaborating with top-ranked UK and EU law firms in dealing with cross-border divorce cases, prenuptial and post-nuptial agreements, enforcing foreign orders, and children-related cases (custody, international abduction, relocation, children maintenance, etc). In addition, the firm collaborates frequently with foreign authorities competent in matters related to child protection. The firm is requested by foreign courts, mainly in the UK and Northern Europe for the issuance of affidavits, acting as experts in Spanish family law.

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Introduction

International child relocation has become a significant issue in family law in Spain, particularly in the context of international families, as Spain is a destination country for many foreign families. This situation arises when one parent, following a separation or divorce, wishes to move to another country with the child, often leading to conflicts between the parents and raising important legal and ethical questions, mainly affecting the child's rights.

This report aims to provide a general guide on international child relocation in Spain. It will address the applicable legal framework, relevant Spanish Supreme Court jurisprudence, and offer a detailed analysis of the "best interests of the child" principle and how it influences judicial decisions regarding relocation.

Legal Framework in Spain

International child relocation in Spain is regulated by a combination of domestic laws and international conventions that seek to protect the child's rights and ensure that any decision made in this context is guided by the principle of the child's best interests.

Spanish Civil Code

The Spanish Civil Code Article 154 provides that the rights inherent to parental authority include that of "deciding the habitual place of residence of the minor, which may only be modified with the consent of both parents or, by judicial authorization".

According with Article 156 of the Spanish Civil Code, it is understood that the Code refers to decisions on relocation and changes of habitual residence of minor children as falling within the scope of the joint exercise of parental authority by both parents. For this reason, they must be adopted by common agreement, or by one of them alone with the consent of the other, except in situations of urgent need and, in the event of disagreement, always by the Spanish judge.

Law 1/1996, of January 15, on the Legal Protection of Minors

This law establishes that the child has the right to have their best interests considered as a priority in any decision affecting them. Article 9 of this law reinforces the right of the child to be heard in all judicial proceedings that concern them, provided they have sufficient judgment, and in any case, if they are over 12 years old.

International regulation

While this report focuses on domestic Spanish issues, it is important to mention that Spain is a party to several international conventions that can influence cases of international child relocation, such as Hague Convention 1996, Council Regulation (EU) 2019/1111, Hague Convention 1980. These instruments regulate co-operation between states to ensure the protection of children in case of relocation.

Best Interests of the Child

The principle of the "best interests of the child" is the central axis in any judicial decision related to international child relocation. This principle is highlighted both in Spanish law and in numerous international instruments ratified by Spain.

Definition and scope

The best interest of the child is an indeterminate legal concept, meaning it does not have a precise or rigid definition. It is a principle that requires all decisions affecting a child to prioritise what is most beneficial for their physical, emotional, and social well-being. The goal is to protect the child and ensure their development is as healthy and balanced as possible, considering their needs and rights.

Factors to consider

When assessing the best interests of the child in a relocation case, Spanish courts usually consider several factors, among others as follows.

- The child's relationship with both parents – The court evaluates the emotional bond and the degree of attachment between the child and both parents, as well as with siblings and other close relatives.
- The child's emotional stability – The court analyses how the relocation might affect the child's emotional stability, considering factors such as their adjustment to their current environment, school performance, and social network.
- The child's ability to adapt to the new environment – The court assesses the child's ability to adapt to the new country, including culture, language, the educational and healthcare systems, and opportunities for personal and social development.
- Living conditions in the new country – The court considers the material and well-being conditions that the child would have in the destination country, including housing, access to education, and healthcare.
- Proposed contact with the left-behind parent – It is crucial to present a detailed plan that allows for the continued and meaningful relationship between the child and the left-behind parent, including regular visits and constant communication and stays.
- The child's opinion – Depending on the child's age and maturity, their opinion will be taken into account, especially if they are over 12 years old. The child's capacity to express their will and understand the implications of the relocation are key elements in the evaluation when the children have enough maturity.

Spanish Supreme Court jurisprudence on the best interests of the child

The Spanish Supreme Court has developed extensive jurisprudence regarding international child relocation, establishing clear criteria on how the principle of the best interests of the child should be applied in each case. The relocation must be based on objective and necessary circumstances and will never be admissible if the relocation is based on the selfish and capricious acts of one of the parents.

Supreme Court criteria

As a reference, relevant cases in which the Spanish Supreme Court has set out the criteria applicable to the best interests of the child are as follows.

- The Supreme Court denied the mother's request to relocate the child to Germany. The court argued that it had not been demonstrated that the relocation would benefit the child, who was fully integrated into their environment in Spain and maintained a meaningful relationship with both parents. This case underscores the importance of the child's emotional stability and the need to maintain their relationship with both parents.
- The Supreme Court authorised the relocation of a child to Argentina, requested by the mother. The judgment highlighted the importance of the mother's employment and family situation in Argentina, as well as the child's relationship with their extended family in that country. The court concluded that, in this case, the relocation was the most appropriate for the child's welfare, emphasising the need to evaluate each case based on its particular circumstances.
- The Supreme Court denied the relocation to the US, arguing that although the mother had presented legitimate reasons for her relocation, it had not been proven that the change would benefit the child. This ruling highlights the importance of proving that the relocation will positively contribute to the child's well-being.
- The Supreme Court permitted the relocation of a child to France with their mother, who had found employment in that country. The judgment highlighted the improved educational opportunities and quality of life that the relocation would provide for the child. Additionally, the measures proposed to ensure that the child maintained a close and continuous relationship with their father, who remained in Spain, were viewed positively.

The decision adopted by the judge must make the protection of the best interests of the minor effective, the Supreme Court stating in its judgement of 28 September 2009, "that the regulations relating to the interests of minors have the characteristics of public order, and therefore must necessarily be observed by judges and courts in the decisions taken in relation to minors...".

In this matter, different rights certainly come into conflict. On the one hand the right of one parent to freely choose their place of residence, and on the other hand the right of the other parent to relate to their minor children (Articles 90, 91, 94 and 103. 1 of the Spanish Civil Code); and above both the principle recognised in Article 39 of the Spanish Constitution, in the Declaration of the Rights of the Child proclaimed by the General Assembly of the United Nations on 20 November 1989, ratified by Spain and in the L.O 1/96, of 15 January, of the prevalence of the benefit and the best interest of the minor.

The Spanish Supreme Court in the judgment dated 20 October 2014, which established jurisprudential doctrine, highlighted that "the change of residence abroad of the custodial parent may be judicially authorized only for the benefit of the minor children under his custody who move with him", on the basis that the change of residence affects many things that have to do not only with moving abroad, with a different language, as in this case, but also with habits, schooling, customs, and even with the travel expenses involved in moving to a country far from the child's environment, as this may prevent or make it difficult for both the child and the left-behind parent to

travel in order to maintain contact with the child. It is the interests of the child that are paramount in these cases".

The problem arises as to the suitability or inadmissibility of moving the child to another place of residence, which may entail a dramatic change in both their social and parental environment, with problems of adaptation; the Spanish Supreme Court specifying in the most recent judgement of 18 January 2017, that in cases of transfers of the custodial parent to a different location from the one in which they had been residing, and to which the child follows them to continue with the custody and guardianship, the respect and protection of the best interests of the child must be taken into account when deciding on this new situation.

In addition, the most relevant is not whether the custodial parent's freedom to choose residence can be restricted, but whether it is appropriate or inappropriate for the child to move to another country, which may entail a radical change in their social and parental environment, with problems of adaptation.

The concept of the interests of minors, as expressed by the Supreme Court in the judgment of 16 September 2016, has been developed in LO 8/2015, of 22 July, on the Modification of the Child and Adolescent Protection System, in the sense that: "The maintenance of their family relationships shall be preserved", "the satisfaction of their basic material, physical, educational, emotional and affective needs shall be protected", "the irreversible effect of the passage of time on their development shall be considered", "the need for stability in the solutions adopted...".

Case Law in Spain on International Child Relocation

Spanish jurisprudence has addressed numerous cases of international child relocation, each with its particularities. Below is an analysis of some common situations and the resolutions adopted by the courts.

Relocation for employment reasons

One of the most common reasons for requesting international relocation is a job offer in another country. In these cases, courts evaluate both the professional opportunity and the parent's ability to provide a better quality of life for the child in the new destination. However, mere economic improvement is not always sufficient to justify relocation if it may destabilise the child emotionally or if their adaptation to the new environment is uncertain.

Relocation for family reasons

In other cases, relocation is justified by the need of a parent to reunite with their extended family in another country or due to a new marriage. Courts consider the stability and emotional support that the extended family can offer the child in the new country. However, it is essential to demonstrate that these new circumstances will not significantly disrupt the child's relationship with the parent remaining in Spain. This usually applies when the other parent has not attended to their parental duties for a long period of time.

Denial of relocation due to lack of child's ties to the new destination

In some cases, courts have denied relocation because the child had no prior ties to the destination country, which could hinder their adaptation. If the child does not speak the language, has no family or friends in the new country, and it has not been demonstrated that the change will significantly improve their well-being, the courts

may consider that the relocation is not in the child's best interests.

Practical Considerations for Parents

For parents considering applying for international relocation with a child, it is crucial to take several practical aspects into account.

Preparation of a detailed plan

It is essential to prepare a detailed plan covering all aspects of the relocation, including residence, education, access to healthcare, and the visitation and communication plan with the parent staying in Spain. This plan must demonstrate that the child's well-being has been carefully considered in all dimensions.

Gather documentary evidence

Gathering all relevant documentation to support the application is crucial. This includes employment contracts, school acceptance letters, medical reports if necessary, and any other evidence that demonstrates that the relocation is in the child's best interests.

Communication and negotiation

Whenever possible, it is advisable to try to resolve the conflict amicably through negotiation or family mediation. Reaching an agreement between the parents is not only less costly and stressful but can also result in a more flexible solution tailored to the needs of all involved.

Evaluation of the new country's environment

Before making a final decision, it is important to conduct a thorough evaluation of the environment in the destination country, considering aspects such as the quality of the education system, social opportunities for the child, and ease of access to medical and psychological services.

Consideration of the child's stability

The court will place great importance on the child's stability, so any proposed change must be clearly aimed at improving their quality of life without causing significant disruption to their routine or important relationships.

Relocation Cases Involving a Child who is Under the Guardianship of the Competent Authorities of Another Country (HCCH 1996)

The international relocation of minors under the custody of competent authorities, such as child protection services or juvenile courts, is a matter of increasing importance in international family law.

These cases typically involve complex situations where the protection of the child, their well-being, and respect for human rights are of paramount importance. Collaboration between states is essential, as is finding an expert lawyer to ensure that decisions regarding the international relocation of these minors is done in a manner that respects their rights and promotes their welfare and that guarantees the legal status of the child in the state to which the child is to be relocated.

Many aspects have to be considered in these cases, such as the recognition of judgments issued by foreign courts, the adaptation of the child's custody to the domestic laws of the new jurisdiction, their incorporation into the educational system of the country where they will reside, guaranteeing the child adequate health care, legalising their residence status in the new country, etc.

Cases of International Child Abduction and Wrongful Retention

If one parent relocates the child to another country without the required consent of the other par-

ent or retains the child unlawfully, the situation should be reported as a case of child abduction or wrongful retention.

The 1980 Hague Convention on the Civil Aspects of International Child Abduction establishes mechanisms to ensure the return of the children. Spain in one of the signatory countries of this convention, and the process to be initiated before Spanish Central Authorities and Spanish Courts would be the subject of a further comprehensive report.

Conclusion

International child relocation is a complex issue that requires a careful and considered approach. In Spain, judicial decisions in this area are guided by the principle of the child's best interests, which involves a detailed assessment of how the relocation will affect their well-being in all aspects. For foreign parents facing this type of situation, it is essential to be well-informed about the applicable legal framework and jurisprudence, and to be prepared to present a solid case demonstrating that the relocation is in the child's best interests.

It is increasingly difficult to find judicial decisions that allow the relocation of children born and raised in Spain to other countries after the divorce of the parents. A really important relocation decision was the one taken by the parents to leave their country of origin to start a new life in another country, with a family life project, which must be continued if it guarantees the protection and well-being of the children.

Separating young children from one of their parents and taking them to a different country has harmful consequences as they would lose their emotional attachment to their parent, a circumstance that some of the parents do not attach any importance to.

It is also worth remembering the enormous complexity of this type of proceedings, in which the position of the judge is of special consideration, as it is not a matter of resolving a mere legal controversy of private claims, but of adopting a decision in which human interests of a family nature converge; a decision that becomes even more complex when the interests of minor children are at stake.

The change of country is a change of crucial importance for the children, so that what is decisive in deciding on the matter, we insist, is the interest of the minors, which is the primary concern, and not the preferences or wishes of their parents; in short, the interest of the parents, however legitimate it may be, is always subordinate to the interest of their minor children.

Finally, if the change of country would mean removing the children from their parent's life, from their usual family environment, school, etc, and exposing them to a new and different educational system and a new social and family environment – far from the one in which they have grown up – even if the destination is the country of origin of one of the parents, this change could negatively impact the children, especially if it is due to their parents' breakup. If it cannot be shown that the relocation is convenient and beneficial for the children themselves, and especially if it would harm their relationship with the left-behind parent, such a move would be contrary to the best interests of the children themselves.

UAE

Law and Practice

Contributed by:
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Al Gharib & Partners LLC was founded in 2002 to provide high-quality legal services to individuals, families, and businesses. Its team consists of 27 dedicated professionals, including six experienced lawyers, six legal advisers, five legal assistants and ten skilled support staff. Each member of the team brings a wealth of knowledge and expertise to the firm, ensuring that it can handle a wide range of legal challenges competently and carefully. The firm covers all legal services – including art and IP law, corporate, business and commercial law, employment and labour law, family law, M&A, sports law, civil law, criminal law, energy law (oil and gas), litigation, arbitration and mediation, real estate law and tax. Its offices are located in Abu Dhabi, Dubai, and Sanaa, with international collaborations in Sudan, South Sudan, Kenya, and Greece.

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

Introduction

The United Arab Emirates is a federal state consisting of seven emirates: Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al Quwain and Ras Al Khaimah, which are located on the bank of the Arabian Gulf, while the seventh emirate, the Emirate of Fujairah, is located on the bank of the Arabian Sea.

There are three laws regarding personal status in the United Arab Emirates. The first is Federal Law No (28) of 2005 on Personal Status, which was promulgated on 19/11/2005, and was subject to the following amendments:

- Federal Decree Law No 8 dated 29 August 2019;
- Federal Decree Law No 5 dated 25 August 2020;
- Federal Decree Law No 29 dated 27 September 2020; and
- Federal Decree Law No 52 of 2023 dated 02 October 2023.

The second is Decree Law No 14 of 2021 (local law in Abu Dhabi only) on Personal Status for Non-Muslim Foreigners, which was promulgated on 3 November 2021 and amended by Decree Law No 15 of 2021.

The third is Federal Decree Law No 41 of 2022 on Civil Personal Status, which was promulgated on 03 October 2022 and entered into force as of 01 February 2023.

The UAE has other laws regarding the protection of child rights such as the following.

- Federal Law No 3 of 2016 on the Child Rights Law (Wadeema).
- Federal Law No 10 of 2019 on the Protection from Domestic Violence Law.
- Federal Law No 24 of 2022 regarding Children of Unknown Parentage.

The UAE does not directly rely on the Islamic Sharia in relation to the personal status matters and the child, but rather the UAE's Laws are derived from the Principles of Islamic Sharia and Juristic Doctrine as stated in Article (2/3) of Federal Law on Personal Status. As for the rights of the child and disputes between parents or third parties regarding the child, all relevant laws always give the judge the discretionary authority to rule for the best interest of the child.

The courts in the UAE are divided into two categories, namely, local courts and federal courts. The local courts are located in the emirates of Abu Dhabi, Dubai, and Ras Al Khaimah, while the federal courts are located in the emirates of Sharjah, Ajman, Umm Al Quwain, and Fujairah. The crucial question that everyone should ask is "what is the difference between local courts and federal courts?".

There are many differences, but the most important for the parties to the claim is that in any local court where the litigant files their claim, the three stages (first instance, appeal, and cassation) take place in the same emirate. As for the federal courts, claims begin in the federal court, but they end in the Supreme Court in the capital of the Federation in Abu Dhabi – ie, when the claim begins, for example, in Sharjah, the first instance and appeal are in Sharjah, and the third and final stage is in Abu Dhabi.

Please note that the federal laws are the governing laws and apply over the entire UAE, how-

ever, there are local laws that are promulgated for special conditions of each emirate.

Federal Decree Law No 41 of 2022 on Civil Personal Status is the Law on Personal Status for Non-Muslims in the UAE, while referring to the Federal Law No 28 of 2005 on Personal Status, when necessary, in accordance with Article (18) of the Federal Decree Law No 41 of 2022 on Civil Personal Status.

Parental Responsibility

In the past, there was a division of responsibilities between the parents. Custody was accorded to the mother, who was making daily decisions regarding the child in terms of their preservation, care, and maintenance, and guardianship was accorded to the father, who was making the major decisions, such as looking into the child's affairs, and disciplining, directing, and educating the child. In the event of a dispute between the parents regarding any matter related to the child, the matter is referred to the court and it is decided according to the child's best interest. However, after the issuance of Federal Decree Law No 41 of 2022 on Civil Personal Status, the parents became equal in their responsibility towards the child, in terms of all the child's needs and the decisions that must be taken for the child, and the law made women and men equal in rights and duties, in particular, in matters including: "4. Joint custody – that a woman and a man shall have an equal right to assume joint custody of the minor child until the latter reaches the age of (18) eighteen years, after which the child shall have the freedom of choice". After the child – whether male or female – reaches the legal age, they shall have the freedom of choice to be with their father or mother, and at this age, the child takes all decisions solely.

It is crucial to know that the parents have full power to make any decision they deem appropriate for the child, before the child reaches the age of 18 years, and if they disagree about any matter related to the children, they must refer the same to the court to decide according to the child's best interest, as expressly stipulated in Article (10/3 and 10/4) of the said Decree Law, where the said article states: "3. In the case of a dispute between both parents over an issue related to joint custody, either parent shall be entitled to apply to the court in accordance with the relevant form to challenge the position of the other parent ask the court to decide on the matter subject matter of dispute. 4. The court shall have a discretionary power to decide a particular course of action in the best interest of the child under custody, based on the request of either parent after divorce". Accordingly, the court will decide on the dispute according to the child's best interest in accordance with the Law of Child Rights in the UAE, namely, the Federal Law No 3 of 2016 on the Child Rights Law.

Joint custody is not permanent, but there are cases where the joint custodian is dismissed as stated in Article (18) of Cabinet Resolution No (122) of 2023 concerning the Executive Regulation of Federal Decree-Law No (41) of 2022 on the Civil Personal Status, which states the following.

- The competent court shall decide on the application to dismiss the father or the mother and give up its right to joint custody, whether temporarily or permanently, in any of the following cases:
  - (a) the risk of the child in custody being exposed to domestic violence or ill-treatment;
  - (b) inadequate living conditions provided by the joint custodian to the child in custody;

(c) the joint custodian has behavioural or psychological problems that would harm the child in custody or expose them to danger or negligence;
(d) loss or lack of eligibility of the joint custodian;
(e) the joint custodian does not perform custodial duties;
(f) the joint custodian commits a crime against morals and honour that prevents it from carrying out its duties or poses a threat to the behaviour of the child in custody, provided that its guilt is proven by a final judgment;
(g) not devote time to caring for the child in custody and be distracted from caring for the child in custody;
(h) the desire of the child in custody, provided that they reach 18 years of age;
(i) the custodian's abuse of drugs, alcohol or any psychotropic substances;
(j) health reasons that prevent the joint custodian from carrying out its duties with respect to the child in custody; and
(k) any other reasons determined by the competent court and in the interest of the child in custody.

1.2 Requirements for Birth Mothers

The objective is to protect the child under custody and the child's right, rather than that of the custodian. The conditions and requirements include the following.

- The custodian must be of sound mind, of legal age and major, honest, capable of bringing up, protecting and caring for the child taken in custody, safe from dangerous infectious diseases and any health reasons that prevent the custodian from carrying out their duties with respect to the child in custody, and must not have been convicted of any dishonourable crime before, such as adultery or other related immorality – ie, the custodian must be of good morals; otherwise, the custodian will fail to bring up the child in custody properly and morally, as the responsibility of the custodian is mainly to raise, protect and care for the child taken into custody.
- It is necessary that the child in custody is not exposed to domestic violence or ill-treatment by the custodian, the living conditions provided by the joint custodian to the child in custody shall be adequate, the custodian or joint custodian does not have behavioural or psychological problems that would harm the child in custody or expose them to danger or negligence, the custodian or joint custodian shall not suffer loss or lack of eligibility, the custodian or joint custodian shall perform custodial duties, the custodian or joint custodian has not committed a crime against morals and honour that prevents them from carrying out their duties or poses a threat to the behaviour of the child in custody, provided that their guilt is proven by a final judgment, and the custodian or joint custodian shall devote time to caring for the child in custody and be distracted from caring for the child in custody.

In all cases, the custodian or joint custodian shall not suffer from abuse of drugs, addiction to alcohol or any psychotropic substances. In general, the law is keen that the child in custody be in safe hands in all respects; therefore, the law gives the competent court the authority and power to remove a custodian for any reasons that the court deems to be prejudicing the child's best interest, as the interest of the child in custody is given priority over all interest. In accordance with Article (59) of the Federal Law No 3 of 2016 on the Child Rights Law, the following is stated.

"Subject to the provisions of the personal status law, the competent court shall, before issuing a judgment on the child custody, request the submission of a detailed report about the social, psychological and health status and the criminal status of the person applying for custody or the person for whom custody will be ordered by the court or the submission of a statement that he did not commit any crime outside the State. The Executive Regulations shall determine the procedures for preparing these report and statement".

Accordingly, the Custody Committee has recently been formed, which performs this role and prepares a comprehensive report on the situation of the parents applying for custody and hears the statements of the child in custody and anyone who can contribute to understanding the situation well, and then submits its report to the competent court that considers the custody case.

All these conditions must be met so that the child in custody is in safe hands and has a trustworthy custodian who takes care of them, until the child in custody reaches the age of 18, and at that time, the child in custody chooses one of their parents or the custodian whom they deem appropriate to reside with.

1.3 Requirements for Fathers

Requirements for fathers are the same as those for birth mothers. See **1.2 Requirements for Birth Mothers** for further detail.

1.4 Requirements for Non-genetic Parents

Requirements for non-genetic parents are the same as those for birth mothers. See **1.2 Requirements for Birth Mothers** for further detail.

In addition, it is worth noting that if the custodian is a man, he shall be a *mahram* (a family member with whom marriage would be considered permanently unlawful) to the child in custody, if the child is a female.

1.5 Relevance of Marriage at Point of Conception or Birth

Recently, the laws in the UAE do not require that parents be married in order to establish the child's paternity. Therefore, if the biological parents are identified, they are obliged to care for and raise the child, making them responsible for the child. Thus, marriage is no longer as crucial as it once was.

The authors believe that this is an important step taken by UAE legislation, as the child should not be held accountable for the actions of their biological parents that led to their conception and birth. It is essential and a natural right for the child to have both parents, just like other children. The UAE has adopted this correct approach in the view of the authors. In summary, as long as it is established that these two individuals are the child's biological parents, they bear parental responsibility for the child.

1.6 Same-Sex Relationships

The United Arab Emirates does not recognise same-sex relationships, viewing them as abnormal and completely unaccepted in Emirati society. It is asserted that such relationships do not result in procreation.

According to religious beliefs, whether Judaism, Christianity, Islam, or others, all agree that God created male and female and from them populated the earth with men and women. Thus, the officials in the UAE, represented by the Deputy Prime Minister and Minister of Interior, Sheikh Saif bin Zayed, stated at the World Government

Summit in Dubai in 2023 that: "The proper family consists of a male and a female, and both society and the state are united to create a suitable environment for future generations, overcoming future challenges and seizing opportunities in a proper manner, free from all forms of pollution, whether intellectual, moral, or environmental". Therefore, there is no place for homosexual relationships in the United Arab Emirates.

1.7 Adoption

Article (14/3) of Federal Decree Law No 41 of 2022 concerning Personal Status states that: "3. The Cabinet may, based on the proposal of the Minister of Justice, issue a resolution regulating the procedures and provisions for adoption and surrogate families and its implications". Thus, the law in the UAE permits adoption, but only for non-Muslims. However, it should be noted that the esteemed Cabinet has not yet issued a decision organising the procedures and provisions of adoption as mandated by the aforementioned article, and the authors, as legal professionals, are still awaiting this.

As for Muslims, some Emirates (Abu Dhabi, Dubai, and Sharjah) have established a system of alternative families for the care of orphans and children of unknown parentage. This is based on Federal Law No 3 of 2016 concerning child rights in UAE, which states that the child who is deprived of his natural family in a permanent or temporary manner shall have the right to alternative care through: "The foster family. 2- Public or private social welfare institutions in case the foster family is not available".

Additionally, Federal Law No (24) of 2022 concerning children of unknown parentage has been issued. The purpose of this law is to regulate the care and custody of these children by providing all necessary support in health, psychological, social, educational, and recreational aspects. It aims to create and secure living conditions conducive to their natural growth, protect them from abuse, inhumane treatment, or neglect, and ensure their proper social upbringing, all under the supervision of the Ministry of Community Development, which has established criteria for selecting foster families. One of these criteria is that the family must be Muslim citizens residing in the country.

The authors believe that the UAE, as a Muslim country, rejects adoption for Muslims because it contradicts the issue of inheritance according to Islamic jurisprudence.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

Under UAE law, neither parent has the right to relocate the child in custody for permanent residence in another country without the consent of the other parent. The judge does not have the authority to grant permission to either parent to move the child in custody from the UAE to another country for the purpose of relocation. Permission is only granted for necessary travel for a temporary period, such as tourism, visits, medical treatment, and similar situations. The principles of the four Supreme Courts in the UAE reflect this and agree on this matter.

This is subject to one exception: if one parent moves to another country for permanent residence and does not return to the UAE, the other parent, who has custody of the child or with whom the child resides, has the right to relocate the child outside the country.

2.2 Relocation Without Full Consent

As previously mentioned, relocation without the consent of both parents is not possible. The matter always hinges on the best interest of the child in all related decisions. Therefore, if the parent wishing to relocate can demonstrate that the child's best interests necessitate it, then the law aligns with the child's interests wherever they lead.

Before 2016, and prior to the issuance of the Child Rights Law (Federal Law No 3 of 2016), the child had no say in this matter and was merely considered a dependent of one parent who had custody. However, following the enactment of this law, Article (59) states: "Subject to the provisions of the personal status law, the competent court shall, before issuing a judgment on the child custody, request the submission of a detailed report about the social, psychological and health status and the criminal status of the person applying for custody or the person for whom custody will be ordered by the court or the submission of a statement that he did not commit any crime outside the State. The Executive Regulations shall determine the procedures for preparing these report and statement".

After the issuance of a decree to form the custody committee, matters have evolved, and the child now has a say in all matters concerning them, including custody. In the personal status laws of the UAE, a child is considered capable of expressing their opinion starting from the age of seven, according to Article (164/3) of the Personal Status Law. Therefore, the child is listened to, and their opinion is considered for guidance. However, the decisive opinion and determination of their future occurs once they reach the age of 18. Article (4/4) of Federal Law No 41 of 2022 concerning civil personal status states: "4. Joint custody: that a woman and a man shall have an equal right to assume joint custody of the minor child until the latter reaches the age of (18) eighteen years, after which the child shall have the freedom of choice".

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

Please refer to **2.2 Relocation Without Full Consent**.

2.3.2 Wishes and Feelings of the Child

Please refer to **2.2 Relocation Without Full Consent**.

2.3.3 Age/Maturity of the Child

Please refer to **2.2 Relocation Without Full Consent**.

2.3.4 Importance of Keeping Children Together

Please refer to **2.2 Relocation Without Full Consent**.

In addition, one of the focuses of personal status laws in the UAE is to keep siblings together whenever possible. However, this is not mandatory to continue indefinitely. If it becomes necessary to separate the children, this is also permissible. For example, if one of the children reaches the age of 18 and wishes to move to their father's care, this is their right, and the law supports them in this, as mentioned above. The remaining children may stay with their mother, for instance, or in joint custody.

2.3.5 Loss of Contact

Please refer to **2.2 Relocation Without Full Consent**.

In addition, UAE laws preserve the right to ongoing communication between parents and children, and there is no room for loss of contact. Communication continues between the child and the other parent who is away, such as when one of the children travels abroad to pursue education and complete their university studies. They remain in contact with both parents. Therefore, there should be no interruption in communication between the child and their parents, except in cases where the child chooses not to contact one of them for any reason.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

Please refer to **2.2 Relocation Without Full Consent**.

In addition, many residents in the UAE are foreign nationals and expatriates who have come to work and reside temporarily, regardless of duration. Thus, when their employment relationship in the UAE ends, some are forced to return to their home countries, while the other parent may still have ongoing work relations. This can lead to a conflict regarding whether the child should stay with the parent who is still working and residing in the UAE or join the parent who has completed their work and returned to their home country.

Therefore, the resolution of such disputes is based on the specifics of each case, with the child's best interest as the primary measure. In many disputes, the court has overlooked the reason for the parent's relocation after their employment contract ended and has refused to grant them custody of the child during the move. This decision depends on the child's age, which parent is leaving the country, and which one is staying. Generally, young children tend to remain with their mother due to their greater need for her more than their father, while older children may choose to leave with their father, as they may have a greater need for him more than the mother at that stage. There are 4 Articles in the UAE Personal Status Law that address the cases of relocation with of a child in custody, Articles 149 to 152. The text below provides further clarification and explanation.

"Article (149) – The custodian may not travel with the fostered child outside the State except with the written approval of his tutor. Should the tutor refuse to give his consent, the matter shall be submitted to the judge."

"Article (150) – 1. The mother, during her wedlock or during her waiting period after a retractable repudiation, may not travel with her child or move him from the conjugal domicile without the written approval of his father. 2. The mother may, after the waiting period, take the child to another city within the State in case this move does not affect his education, is not prejudicial to the father and does not cost him unusual effort and expense to be informed about the fostered child's condition."

"Article (151) – 1. Should the custodian be other than the mother, she may not travel with the child without a written authorization from his tutor. 2. The tutor, whoever he is, or another person, may not travel with the child during fosterage without a written authorization of the custodian. 3. The fosterage of the repudiated mother may not be forfeited just because the father moved to a city other than that in which the custodian resides, unless the move is for the purpose of settling, is not prejudicial to the mother and the distance between the two cities does not allow the mother to see the fostered child and return the same day by the usual transportation means."

"Article (152) – The custodian's right to fosterage is forfeited in the following instances: 1. Derogation to one of the conditions stated in Articles (143) and (144). 2. In case the custodian elects a domicile in another city thus making it difficult for the tutor to attend to his duties. 3. Should the person entitled to fosterage keep silent and do not claim this right for a period of six months without excuse. 4. Should the new custodian live with the one whose fosterage has been forfeited for a reason other than physical disability."

2.3.7 Grounds for Opposition to Relocation

With the reading together of Article (151/3) and Article (152/2), it is clear that relocation should consider:

- relocation with the intention of settlement;
- not causing harm to the mother;
- the distance between the two countries does not prevent one parent seeing the child and returning on the same day using normal means of transportation; and
- difficulty for the guardian to fulfil their duties towards the child.

Additionally, Article (148/1) outlines the duties and responsibilities of the guardian, which are: "1. The father or other guardians of the child must look after his affairs, discipline, guidance, and education".

All these conditions must be met for one of the parents to travel with the child outside the United Arab Emirates, or with the consent of the other parent, and in case of refusal, the matter shall be referred to the judge to decide what is in the best interest of the child regarding staying or leaving with one of the parents.

2.3.8 Costs of an Application for Relocation

The costs of relocating the child are to be borne by the parent who wishes to take the child with him, and the other parent is not obligated to bear these costs. The Dubai Court of Cassation has decided in one of its principles that the cost of travel tickets abroad is not part of the alimony elements. This was as stated in the Regulation issued in 2022 regarding the rights included in the judgment of the Court of Cassation – Dubai on 2 March 2022 in appeal No 622/2021 Personal Status Appeal and 626/2021 Personal Status Appeal.

2.3.9 Time Taken by an Application for Relocation

Submitting a request for departure with the child is done by submitting an order on a petition, and the judge's response comes within 72 hours, provided that the required documents are ready and attached to the request. This is for temporary departure and later return. In this case, the parent who requests to leave with the child in custody, after the court's approval, must give a guarantee for their return with the child in custody to the country after the temporary travel period.

Relocating and settlement in another country is done through a substantive lawsuit which may go through three stages: the first instance, the appeal, and the cassation. It should not take more than one year, as it includes reviewing the reasons and defences of each party, and weighing one side over the other, based on the interest of the child to be transferred. The losing party in the lawsuit can object to the judgment within 30 days from the day following its issuance. After the appeal, there is also another opportunity to appeal the judgment before the Court of Cassation, which is also 30 days. After the final and

conclusive judgment is issued in the case, the prevailing party can transfer the child with them.

2.3.10 Primary Caregivers Versus Left-Behind Parents

The court's decision depends on the best interest of the child, and there is no room for sympathy with one parent over the other, or the necessity of the decision being suitable for the left-behind parent. Rather, the child's interest is the primary consideration, and it takes precedence over other interests.

2.4 Relocation Within a Jurisdiction

Everything discussed so far in this chapter concerns travel outside the United Arab Emirates. As for travelling within the country – ie, within the cities and emirates of the state, Article (150/2) of the Personal Status Law states: "2. After separation, the mother may move with the child to another place in the state if this transfer does not compromise the child's upbringing, does not harm the father, and does not impose unusual difficulty or expense on the father in checking the child's well-being". Indeed, the court does not currently apply this article due to the short distances between the emirates and cities of the state, after the roads have been paved, expanded, and the speed limits increased. Therefore, residing with the child in any emirate of the state has become permissible and is not a reason to drop custody from the relocating parent.

3. Child Abduction

3.1 Legality

The relocation of a child in custody, after the separation of their parents, without the consent of the other parent or without the authorisation of the judiciary, is considered illegal. It is not permitted and is regarded as a violation of the legal boundaries established by law. Any parent wishing to travel with the child must obtain the consent of the other parent. In case of refusal, the parent wishing to travel with the child must seek authorisation from the judge to grant the travel permit, to avoid committing an illegal act.

3.2 Steps Taken to Return Abducted Children

Unfortunately, the United Arab Emirates is not a signatory to the Hague Convention dated 25 October 1980, on the Civil Aspects of International Child Abduction; at least not yet. As lawyers, the authors exert tremendous efforts within the country to encourage the authorities to sign this important convention. Since the United Arab Emirates is not among the countries that have signed the convention, if the child is abducted, taken out of the country, or travelled with before the other parent takes action to prevent the child"s travel, it becomes very difficult to return the child to the country. To the knowledge of the author, no child has been returned to the state after being taken out of it.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

The United Arab Emirates is not a signatory to the 1980 Hague Convention.

3.4 Non-Hague Convention Countries

When a child is removed to the United Arab Emirates from a foreign country, where there is a judgment, it is necessary to review the bilateral agreements signed between the two countries – ie, the UAE and the country from which the child was brought. If there is a bilateral agreement for the enforcement of judicial judgments between the two countries, then the entitled party must present and enforce that judgment. Upon receiving the child from the abductor, they should transport the child to their country. If the

child is under a travel ban, the parent who asked for the child's return has to request the court to cancel the travel ban. This procedure (enforcement of the judgment and cancelling the travel ban) should not take more than a maximum of one month.

If there is an agreement between the parties, the abductor would have violated the signed agreement between them, and the court will correct this situation by obliging the abductor to immediately hand over the child and return them to their country.

The cost of such a procedure does not exceed modest amounts, ranging from USD150 to USD200 at most.

The identity of the country is not directly relevant to this matter; rather, the presence or absence of a bilateral agreement between the two countries is what is important.

Conclusion

At the beginning of this research or article, we explicitly stated that the law of the United Arab Emirates promotes joint custody, being an equal and shared right for both the father and the mother. Article (10/1) of the law states: "1. Custody of children is a joint and equal right for both the father and the mother after divorce. It is also a right for the children not to be exclusively raised or seen by one parent over the other, to maintain the psychological well-being of the child and reduce the impact of divorce on the children".

If this is legally established, anyone who fails to hand over the child to the rightful parent will be punished by imprisonment or a fine, according to the UAE Penal Code, where Article (379) states: "Anyone who is responsible for a child and is requested by the rightful person to hand over the child pursuant to a final decision or judgment from the judiciary and refuses to do so shall be punished by imprisonment or a fine", and Article (380) further states: "Any parent or grandparent who kidnaps their minor child or grandchild, either personally or through others, even without deceit or coercion, or refuses to return or hand over the child to the rightful custodian as per a final decision or judgment from the judiciary, shall be punished by imprisonment or a fine".

According to these two articles, anyone who kidnaps a child from either parent or grandparents exposes themselves to legal punishment. Additionally, other measures will be taken against them, such as not allowing them to see the child alone, specifying a supervised location for visits by the mother or a neutral party, and potentially losing custody altogether.

Important Note

Anyone dealing with personal status law in the UAE, whether it be the Personal Status Law or the Civil Personal Status Law, both of which have been detailed above, must understand that both laws, in their first Article, permit the parties to choose their applicable law. Article (1) of Federal Law No (28) of 2005 concerning Personal Status states: "The provisions of this law shall apply to the citizens of the United Arab Emirates unless non-Muslims have special provisions pertaining to their sect and doctrine. The provisions of this law shall also apply to non-citizens unless they insist on applying the law of their home country, provided that it does not conflict with the provisions of Articles 12, 13, 14, 15, 16, 17, 27, and 28 of the Civil Transactions Law issued by Federal Law No. (5) of 1985 and its amendments".

Additionally, Article (1/1 and 2) of Federal Decree Law No (41) of 2022 concerning Civil Personal Status states:

"1. The provisions of this decree-law shall apply to non-Muslims who are citizens of the United Arab Emirates, and to non-Muslim foreigners residing in the country unless they insist on applying their law concerning matters of marriage, divorce, inheritance, wills, and proof of lineage, without prejudice to the provisions of Articles (12), (13), (15), (16), and (17) of Federal Law No (5) of 1985 referred to above.

2. The persons addressed by the provisions of this decree-law mentioned in clause (1) of this article may agree to apply other legislations regulating family or personal status matters in force in the state instead of applying the provisions of this decree-law".

If the parties wish to apply their law, they must do the following:

- provide their law (the code);
- have it certified by the official authorities;
- translate it into Arabic (so far); and
- obtain a letter from their embassy or consulate certifying that the law to be applied is the applicable law in their home country or the country where they were married, as per their situation.

Trends and Developments

Contributed by:
Mukhtar Gharib
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Al Gharib & Partners LLC was founded in 2002 to provide high-quality legal services to individuals, families, and businesses. Its team consists of 27 dedicated professionals, including six experienced lawyers, six legal advisers, five legal assistants and ten skilled support staff. Each member of the team brings a wealth of knowledge and expertise to the firm, ensuring that it can handle a wide range of legal challenges competently and carefully. The firm covers all legal services – including art and IP law, corporate, business and commercial law, employment and labour law, family law, M&A, sports law, civil law, criminal law, energy law (oil and gas), litigation, arbitration and mediation, real estate law and tax. Its offices are located in Abu Dhabi, Dubai, and Sanaa, with international collaborations in Sudan, South Sudan, Kenya, and Greece.

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Introduction

The UAE rapidly evolves as a global hub for economic and cultural exchange, drawing people from various backgrounds and nationalities. This dynamic environment has significant implications for child relocation, a process involving the transfer of children due to changes in their parents' or guardians' circumstances, such as employment relocations, family reunification, or even changes in residency status. In recent years, the UAE has witnessed significant trends and developments in child relocation, driven by both local and international factors. This article explores these trends and developments, providing an in-depth analysis of the factors influencing child relocation in the UAE and the measures in place to ensure that children's well-being remains a priority during such transitions.

Economic and Demographic Trends Influencing Child Relocation

Economic growth and globalisation

The UAE's robust economic growth and increasing globalisation have led to an influx of expatriates and international organisations setting up office there. Child relocation becomes an essential consideration. The UAE's economic prosperity, coupled with its strategic location as a business hub, means that many international families relocate to the UAE for work opportunities. This trend is evident in the growing number of international schools and childcare services catering to the diverse expatriate population.

Rising expatriate population

The UAE has one of the largest expatriate populations in the world, with expatriates making up a significant portion of the country's residents. Employment opportunities, educational prospects, or lifestyle preferences drive the relocation of expatriate families. This has led to a demand for relocation services that cater specifically to the needs of children, including educational support, childcare, and integration services. The rise in expatriate families has prompted a corresponding increase in the number of organisations specialising in child relocation and support services.

Urbanisation and infrastructure development

Rapid urbanisation and infrastructure development in the UAE have transformed cities like Dubai and Abu Dhabi into modern metropolises. This urban growth impacts child relocation by creating new, neighbourhoods, schools, and recreational facilities. Families moving to the UAE often seek homes in newly developed areas with access to high-quality schools and child-friendly amenities. The UAE government's focus on creating family-oriented communities with state-of-the-art facilities reflects the increasing importance of accommodating the needs of relocating families.

Educational Trends and Innovations

Expansion of international schools

As the expatriate population grows, so does the demand for international schools that offer curricula from various countries. The UAE has seen a significant expansion in the number of international schools, providing diverse educational options for relocating families. These schools offer curricula such as the British, American, IB (International Baccalaureate), and other international programmes, catering to the educational needs of children from different backgrounds. The availability of these schools is a key factor in attracting expatriate families and facilitating their relocation.

Emphasis on bilingual and multicultural education

With a diverse population, there is a growing emphasis on bilingual and multicultural educa-

tion in the UAE. Schools are increasingly focusing on teaching to prepare students for a globalised world. This trend is particularly relevant for relocating children who need to adapt to new linguistic and cultural environments. Multicultural education programmes help children from different backgrounds integrate smoothly into their new surroundings, fostering inclusivity and understanding.

Integration of technology in education

The integration of technology in education is another significant trend impacting child relocation. Many schools in the UAE are adopting advanced technologies and digital tools to enhance the learning experience. This includes using interactive whiteboards, online learning platforms, and educational apps. For relocating families, access to schools with modern educational technologies can ease the transition and ensure that children continue to receive high-quality education in their new environment.

Legal and Regulatory Developments

Child custody and parental rights

Child custody and parental rights are critical aspects of child relocation, especially when parents are involved in cross-border moves. The UAE has specific legal provisions regarding child custody and guardianship, which can impact the relocation process. The UAE follows Islamic family law, which governs custody and guardianship matters. Understanding these legal requirements is essential for expatriate families moving to or within the UAE, as it affects how parental rights are managed during relocation.

Immigration and residency policies

Immigration and residency policies in the UAE significantly affect child relocation. The UAE government has implemented various policies to streamline the immigration process for expatriates, including issuing residence visas and work permits. These policies impact how families relocate, including the process for bringing children into the country. Recent developments in residency policies, such as the introduction of long-term residency visas and retirement visas, have provided additional options for expatriates, influencing their decision to relocate to the UAE.

Protection of child rights

The UAE has made significant strides in protecting children's rights through legislative and policy measures. The Federal Law No 3 of 2016 on Child Rights (Wadima Law) is a landmark piece of legislation aimed at safeguarding children's rights and ensuring their well-being. This law addresses various aspects of child welfare, including protection from abuse, access to education and healthcare. Understanding and complying with these regulations is crucial for relocating families to ensure that children's rights are upheld during their relocation process.

Family Village and Fostering Programme

The UAE has taken significant steps to provide alternative care options for children who cannot be raised by their biological families. One notable initiative is the Family Village, a government-sponsored programme designed to create a nurturing and supportive environment for orphaned and vulnerable children. Established with the support of Dubai's Community Development Authority, the Family Village operates on a family-based model where children are cared for in a communal setting by professional "mothers" who provide emotional and physical care. This initiative emphasises the importance of a stable home environment, aiming to replicate the dynamics of a traditional family structure. Children in the Family Village are provided with shelter, education, healthcare, and psychological support, ensuring their holistic well-being.

Living in this supportive community gives these children access to the same opportunities as their peers, including extracurricular activities, recreational facilities, and emotional counselling, which are critical for their development and social integration.

The fostering programme in the UAE complements this initiative by providing an alternative care option for children who cannot be placed in institutional care. While traditional adoption is not permitted under Islamic law, fostering allows children to be raised in family environments where they can receive the individual care and attention they need. Foster families in the UAE undergo strict vetting processes, including background checks, financial assessments, and home evaluations to ensure the child's safety and well-being. Once approved, foster families are expected to provide for the child's emotional and material needs, much like a biological family would.

In fostering arrangements, the government ensures that children's rights under the Wadima Law are protected, and both foster families and the children receive ongoing support from social workers and child protection specialists. The UAE's focus on family-based care models, through both the Family Village and the fostering programme, reflects its commitment to the global principles of child protection and welfare. These programmes aim to provide long-term stability for vulnerable children while also promoting their integration into society as active, well-rounded individuals.

Furthermore, the Family Village and fostering initiatives align with international standards for alternative child care, emphasising the need for children to grow up in family-like settings instead of institutional care. The UAE continuously expands its child welfare programmes, recognising that children who grow up in nurturing, supportive environments are more likely to succeed academically, socially, and emotionally. These programmes also contribute to the country's broader goal of ensuring that every child in the UAE can live in a safe, caring, and stable environment, regardless of their background or circumstances.

Support Services for Relocating Families

Relocation assistance and counselling

Relocation assistance and counselling services have become increasingly prevalent in the UAE to support families during their move. These services include assistance with finding housing, enrolling children in schools, and navigating the cultural and social aspects of life in the UAE. Relocation consultants often provide guidance on settling into the new environment, helping families adjust to their new surroundings smoothly. For children, these services may include counselling to address any emotional or psychological challenges associated with relocation.

Community support and integration programmes

Community support and integration programmes are vital in helping relocating families and children adapt to their new environment. Many expatriate communities in the UAE have established social groups and support networks that offer guidance and resources for new arrivals. These programmes often include cultural orientation sessions, social events, and recreational activities designed to help families integrate into the local community. These programmes can provide children opportunities to make new friends and participate in activities that ease the transition.

Specialised childcare and educational services

Specialised childcare and educational services have emerged to cater to the needs of relocating families. These services include bilingual childcare centres, tutoring services, and extracurricular programmes that support children's academic and social development. Such services are designed to address the unique challenges faced by relocating children, including language barriers and adapting to new educational systems. The availability of these services enhances the overall relocation experience for families and ensures that children receive the support they need.

Challenges and Opportunities in Child Relocation

Cultural adjustment and social integration

One of the primary challenges in child relocation is cultural adjustment and social integration. Relocating children may experience difficulties adapting to new cultural norms, languages, and social environments. This can impact their emotional well-being and academic performance. Addressing these challenges requires a concerted effort from families, schools, and support services to provide children a nurturing and inclusive environment.

Access to quality education and healthcare

Access to quality education and healthcare is crucial for the well-being of relocating children. Ensuring that children receive appropriate educational and healthcare services in their new environment can be challenging for relocating families. The UAE's educational and healthcare infrastructure investment provides opportunities for families to access high-quality services, but navigating these systems may require additional support for new arrivals.

Legal and administrative complexities

Legal and administrative complexities can pose challenges for relocating families concerning residency permits, child custody, and compliance with local regulations. Understanding and managing these complexities requires careful planning and assistance from relocation experts. Families need to be aware of the legal requirements and procedures to ensure a smooth relocation process.

Criteria to Consider for Child Relocation in the UAE

Focus on the child's best interests

The UAE courts are increasingly prioritising the "best interest of the child" in relocation cases, following international child custody standards. The court conducts a thorough examination of several factors, including the child's emotional and physical well-being, stability, continuity of education, and the nature of the parent-child relationship.

Legal framework and reform

The UAE Personal Status Law governs custody, divorce, and child relocation. Recent revisions have made it apparent that relocation without both parents' approval or a court order can result in legal implications such as custody reversal or criminal prosecution.

In 2021, the UAE made significant changes to personal and family legislation, mostly for non-Muslim expats, with more freedom in resolving child custody and relocation difficulties. The new laws allow non-Muslims to use their native country's family law in court disputes, which can impact relocation choices.

International treaties and custody disputes

Although the UAE is not a signatory to the Hague Convention on the Civil Aspects of International

Child Abduction, which complicates child relocation situations involving many countries, it has significantly worked to improve international collaboration on child custody issues. The courts have shown an increased willingness to respect international judgments and collaborate with other jurisdictions to resolve child abduction and relocation disputes, particularly in cases involving non-Muslim expatriates.

Passport retention and travel bans

One distinguishing feature of child relocation in the UAE is the widespread use of travel bans and passport withholding. One parent may request that the court impose a travel ban on the child, preventing the other parent from relocating them without consent.

This has been a complicated topic, particularly among expatriate parents, who may feel trapped in the UAE due to such restrictions, especially if they want to return to their home country after divorce.

Collaborative parenting and mediation

Courts in the UAE are increasingly supporting mediation and amicable settlements in relocation issues. Parents are encouraged to reach arrangements in the child's best interests and maintain the child's relationship with both parents.

Collaborative parenting arrangements, where the child can maintain regular contact with both parents even after relocation, are becoming more common.

Utilisation of technology

With the rise of digital communication, UAE courts and parents are more willing to consider virtual visitation or co-parenting arrangements, which allow the child to keep contact with the non-relocating parent through video conversations or online communication platforms.

Future Outlook

Looking ahead, the trends and developments in child relocation in the UAE are likely to continue evolving in response to global changes and local needs. The ongoing focus on economic diversification, educational innovation, and legal reforms will shape the future landscape of child relocation. As the UAE strives to maintain its status as a leading global destination, it will be crucial to remain adaptable and responsive to the needs of relocating families, ensuring that children receive the support and opportunities necessary for a successful transition.

In summary, child relocation in the UAE is a multifaceted process influenced by economic, educational, legal, and support factors. The country's proactive approach to addressing the needs of relocating families reflects its commitment to creating a nurturing and inclusive environment for children. As trends and developments unfold, the UAE's ability to adapt and provide comprehensive support will play a key role in ensuring a positive relocation experience for children and their families.

Conclusion

As the country continues to grow and attract international families, the trends and developments in child relocation reflect the evolving needs of relocating families and demonstrate a delicate balance between respecting both parents' rights and ensuring the child's best interests, all within the UAE's unique legal and cultural setting. From expanding educational options to legal protections and support services, the UAE is working to ensure that relocating children have the resources and support they need to thrive in their new environment. By addressing

the challenges and leveraging the opportunities, families can navigate the relocation process more effectively, ensuring a positive experience for their children and a successful transition to life in the UAE.

UK

Law and Practice

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Hughes Fowler Carruthers is widely regarded as one of London's leading divorce and family law practices. Established more than 20 years ago, the firm specialises in ultra-high net worth and high-profile cases, especially those with international aspects. Hughes Fowler Carruthers retains its long-established Band 1 ranking in Chambers and Partners, with four partners ranked in Band 1 or as "star individuals" and three other lawyers individually ranked – although all partners are highly experienced and top rated in every aspect of family law. The firm's lawyers also have in-depth knowledge of many foreign jurisdictions and excellent overseas contacts. Hughes Fowler Carruthers is the firm of choice for high-value prenuptial and postnuptial agreements (especially those with cross-jurisdictional aspects) and is renowned for keeping clients, their businesses and cases away from the glare of publicity. The firm's lawyers have extensive experience in mediation and collaborative approaches but are also highly expert litigators when a more robust approach is required.

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

In England and Wales, a parent's decision-making power is defined as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property" (Section 3(1) of the Children Act 1989). This authority is known as "parental responsibility" and empowers a person to make decisions in relation to, among other things, a child's education and healthcare.

1.2 Requirements for Birth Mothers

Parental responsibility is acquired automatically by a child's birth mother in England and Wales.

1.3 Requirements for Fathers

A father's parental responsibility in England and Wales will depend on their relationship to the child's mother at the time of birth.

Parental responsibility is acquired automatically by a child's father if they are:

- married to the child's mother at the time of birth; or
- a civil partner of the child's mother at the time of birth (from 2 December 2019).

Alternatively, parental responsibility can be acquired by unmarried fathers in the following ways:

- by subsequently marrying or, from 2 December 2019, becoming a civil partner of the child's mother;
- by being registered as the child's father on their birth certificate on or after 1 December 2003;
- by entering into a parental responsibility agreement (in Form C (PRA1) and recorded in the prescribed manner) with the child's mother;
- by obtaining a parental responsibility order from the court so long as the child is under 18; and
- by being formally appointed as the child's guardian by the mother or by the court.

If the father is named as the parent with whom the child is to live, a parental responsibility order must be made. However, if the father is named as someone with whom the child is merely to

spend time, such an order need only be considered.

1.4 Requirements for Non-genetic Parents

There are various categories of non-genetic parents in England and Wales and the route to parental responsibility is different within each category.

Adoption

The making of an adoption order pursuant to the Adoption and Children Act 2002 will automatically confer parental responsibility on the adopting parent. Save in limited circumstances, the applicant(s) must be at least 21. Where there are two applicants, at least one must be domiciled in the British Isles and both must have been habitually resident in the British Isles for a year. The application must be made before the child's 18th birthday and the order must be made before the child's 19th birthday. Any existing parental responsibility held by another parent will be extinguished upon the making of an adoption order, unless the adopting parent is a step-parent of the adopted child.

Step-Parents

Prior to 30 December 2005, step-parents who wished to acquire parental responsibility for their step-children would be required to formally adopt them. This changed with the introduction of the Adoption and Children Act 2002. Step-parents are now also able to acquire parental responsibility by:

- entering into a parental responsibility agreement (in Form C (PRA2)) with the child's mother and father (if both have parental responsibility) or with the child's mother (if only she has parental responsibility); or
- applying to court for a parental responsibility order (so long as they are married to or the civil partner of a parent who has parental responsibility for the child).

In some cases, a step-parent may also acquire parental responsibility by being formally appointed as the child's special guardian.

Same-Sex Female Relationships

The following provisions apply to a child or children conceived after 6 April 2009.

Pursuant to Section 42 and Section 43 of the Human Fertilisation and Embryology Act 2008, parental responsibility is acquired automatically by the other parent at the time of birth if – at the time of placing the embryo or the sperm and eggs in the mother or of her artificial insemination – the other parent is:

- married to the child's mother;
- a civil partner of the child's mother at the time of birth; or
- there is agreement from the child's mother that the other parent shall be treated as such, provided the criteria in Section 43 are met.

Note that the first two points will not apply if the other parent does not consent.

The further criteria of Section 43 of the Human Fertilisation and Embryology Act 2008 are as follows. Subject to Section 45(2–4), the other woman is to be treated as a parent of the child "if no man is treated by virtue of Section 35 as the father of the child and no woman is treated by virtue of Section 42 as a parent of the child but:

- the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, in the course of treatment services provided

in the United Kingdom by a person to whom a licence applies;
- at the time when the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, the agreed female parenthood conditions (as set out in Section 44) were met in relation to another woman, in relation to treatment provided to W under that licence; and
- the other woman remained alive at that time".

The criteria set out in Section 45 of the Human Fertilisation and Embryology Act 2008 applies to other parents as defined under Section 42 and Section 43 of the Act, as follows.

- "Where a woman is treated by virtue of Section 42 or 43 as a parent of the child, no man is to be treated as the father of the child.
- In England and Wales and Northern Ireland, Sections 42 and 43 do not affect any presumption – applying by virtue of the rules of common law (or Section A1(2) of the Legitimacy Act 1976) (or Section 2(1)(a) of the Family Law Act (Northern Ireland) 2001) – that a child is the legitimate child of the parties to a marriage (or civil partnership).
- In Scotland, Sections 42 and 43 do not apply in relation to any child who – by virtue of any enactment or other rule of law – is treated as the child of the parties to a marriage (or civil partnership).
- Sections 42 and 43 do not apply to any child to the extent that the child is treated by virtue of adoption as not being the woman's child."

Parental responsibility is otherwise acquired by the other parent after the child's birth in the same way that it is acquired by an unmarried father – ie, by either:

- subsequently marrying or becoming a civil partner of the child's mother;
- being registered as the child's parent on or after 1 September 2009;
- entering into a parental responsibility agreement with the child's mother (in Form C (PRA3));
- obtaining a parental responsibility order of the court so long as the child is under 18;
- being formally appointed as the child's guardian by the mother or by the court; or
- being named as the parent with whom a child should live – in which case, a parental responsibility order must be made (whereas it need only be considered if the other parent is named as someone with whom the child is to spend time).

Surrogacy

Where a surrogate mother carries and gives birth to a child, she will be the child's legal mother. If the surrogate mother is married, the husband of the surrogate mother will be treated as the father of the child unless it is shown that he did not consent to the arrangement. An application for a parental order can be made by either one or two applicants, provided that one of the applicant's gametes were used to create the embryo.

The additional criteria set out in Section 54A of the Human Fertilisation and Embryology Act 2008 where there is one applicant are as follows.

- The application must be made within six months of the child being born.
- The child's home must be with the applicant who must be domiciled in the UK, the Channel Islands or the Isle of Man.
- The applicant must be 18 or older.
- The mother who carried the child – as well as any other parent of the child who is not an applicant – must understand and freely and

unconditionally agree to the order being made (unless that parent cannot be found or is incapable of giving agreement and provided the mother's agreement is not given less than six weeks after birth).
- No money or other benefit (other than for expenses reasonably incurred) must be given or received by either of the applicants for or in consideration of the making of the order, the required agreement, the handing over of the child, or the making of arrangements with a view to the making of the order, unless authorised by the court.
- There must not be any other existing parental orders in place in respect of the child.

The additional criteria set out in Section 54 of the Human Fertilisation and Embryology Act 2008 where there are two applicants are as follows.

- They must be husband and wife, civil partners or living as partners in a permitted and enduring family relationship.
- The application must be made within six months of the child being born.
- The child's home must be with the applicants, who must both be domiciled in the UK, the Channel Islands or the Isle of Man.
- Both applicants must be 18 or older.
- The mother who carried the child – as well as any other parent of the child who is not an applicant – must understand and freely and unconditionally agree to the order being made (unless that parent cannot be found or is incapable of giving agreement and provided the mother's agreement is not given less than six weeks after birth).
- No money or other benefit (other than for expenses reasonably incurred) must be given or received by either of the applicants for or in consideration of the making of the order, the required agreement, the handing over of the child, or the making of arrangements with a view to the making of the order, unless authorised by the court.
- There must not be any other existing parental orders in place in respect of the child.

These surrogacy provisions do not apply where an applicant is the husband of the other applicant and he had intercourse with the surrogate mother.

Others

Parental responsibility can be acquired by other parents not falling within the above-mentioned categories if they:

- have been formally appointed as the child's guardian by the child's parent or the court;
- have been named as the person with whom a child is to live (although their parental responsibility will only last for the duration of the order); and
- have been named as the person with whom a child is to spend time and the court considers it appropriate to confer parental responsibility on them (although this parental responsibility will only last for the duration of the order if granted).

1.5 Relevance of Marriage at Point of Conception or Birth

As set out in **1.3 Requirements for Fathers**, a child's father will automatically acquire parental responsibility if they are married to – or, from 2 December 2019, in a civil partnership with – the child's mother at the time of the child's birth. The father must otherwise take formal steps, ranging from registration to obtaining a court order, to acquire parental responsibility for the child after birth. The point of conception for married mothers and fathers does not have an impact on the process of obtaining parental responsibil-

ity in England and Wales, save that the father's consent may subsequently be required if parental responsibility is to be conferred on another parent.

1.6 Same-Sex Relationships

See **1.4 Requirements for Non-genetic Parents**.

1.7 Adoption

As set out in **1.4 Requirements for Non-genetic Parents**, an adoptive parent automatically acquires parental responsibility upon the making of an adoption order.

The court must be satisfied that at least one of the following criteria in Section 47 of the Adoption and Children Act 2002 is met before making an adoption order.

- The child's parents (ie, those with parental responsibility for the child) must consent to the order being made or the court must think it is appropriate to dispense with such consent.
- If the child was placed by an adoption agency, the child must have been placed with the prospective adopter by the adoption agency and the child's parents or guardians must not oppose the adoption. The child must have been placed under a placement order or with the consent of the parents/guardians (the child must have been at least six weeks old when the mother provided her consent).
- The child is subject to a Scottish permanence order or is free for adoption under Article 17(1) or 18(1) of the Adoption (Northern Ireland) Order 1987 (SI 1987/2203 (NI 22)).

It should be noted that the court's leave is required for a parent or guardian to make an application to oppose the making of an adoption order and leave must not be given unless there has been a change in circumstances since the relevant consent was given or the placement order made. The child's welfare will be paramount to the court's considerations – although the parent's prospect of success if leave is given will also be relevant.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

If a parent wishes to move a child of the family permanently out of the family home to a new country, they require the written consent of every person who has parental responsibility for the child pursuant to Section 13(1)(b) of the Children Act 1989.

2.2 Relocation Without Full Consent

If a parent wishes to move a child of the family permanently out of the family home to a new country and they do not have the written consent of every person who has parental responsibility for the child, the parent who wishes to relocate must make an application for the court's permission to do so. Without the requisite consent or permission of the court, the parent wishing to relocate could find themselves guilty of the criminal offence of child abduction (for more details of which, see **3. Child Abduction**).

On 31 May 2024, Practice Direction 12B of the Family Procedure Rules was amended to include a pre-action protocol setting out the steps that must be taken before private law applications relating to children are made. The court will now expect parties to consider a form of non-court dispute resolution before issuing proceedings. This protocol will not apply where there is a risk of the removal of a child from the UK, but will apply to relocation applications generally.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

The child's welfare will be the court's paramount consideration when determining a relocation application. The exercise has been described by various judges as a "holistic" one, in that it requires a careful balancing of various factors that are relevant to the child's welfare and circumstances. There is no presumption either in favour of or against these applications.

The welfare checklist at Section 1(3) of the Children Act 1989 presents a useful starting point for what the court will have regard to when determining these applications. Among the factors included in the welfare checklist are:

- the ascertainable wishes and feelings of the child concerned (considered in the light of the child's age and understanding);
- the child's physical, emotional and educational needs;
- the likely effect on the child of any change in their circumstances;
- the child's age, sex, background and any of the child's characteristics that the court considers relevant;
- any harm that the child has suffered or is at risk of suffering;
- how capable each of the child's parents – and any other person to whom the court considers the question relevant – is of meeting the child's needs; and
- the range of powers available to the court.

This list is not exhaustive.

The 2010 Washington Declaration on International Relocation is often cited by judges in England and Wales for the factors that it considers relevant to decisions on international relocation, such as:

- the child's right to regular contact with both parents;
- the child's views with regard to their age and maturity;
- the proposals for practical arrangements such as schooling, accommodation and employment;
- the reasons for the relocation;
- any history of abuse within the family;
- the history of the family (including past and current contact, custody and access arrangements);
- the impact of a grant or refusal on the child's extended family, education, social life, etc;
- the co-parenting relationship between the child's parents;
- the prospects, costs and enforceability of proposals for contact; and
- mobility issues.

Other factors – such as the right to a family life, the genuine nature of any application or objection, immigration issues, and the emotional and psychological effect of a refusal on the parent wishing to relocate – will also be relevant.

Some of the key precedents in this area are:

- K v K (children) (removal from jurisdiction) (2011) EWCA Civ 793, (2011) All ER (D) 67 (Jul);
- Re F (a child) (permission to relocate) (2012) EWCA Civ 1364, (2013) 1 FLR 645; and
- Re F (A child) (international relocation: welfare analysis) (2015) EWCA Civ 882, (2015) All ER (D) 90 (Aug).

2.3.2 Wishes and Feelings of the Child

As set out in **2.3.1 Factors Determining an Application for Relocation**, the ascertainable wishes and feelings of the child concerned (considered in light of their age and understanding) will be a relevant factor for the courts in England and Wales to take into account. The weight given to those wishes and feelings will depend upon the age and maturity of the child in question. Whether or not these wishes and feelings are a determining factor will depend on the facts of the case.

2.3.3 Age/Maturity of the Child

As a general rule of thumb, the older the child, the greater weight their voice will carry in relocation proceedings – although that will not always be the case where, for example, it is evident to the court that the child's views have been influenced by either of their parents. In the case of S v D and another (2023) EWHC 984 (Fam), the views expressed by a 14-year-old boy – who intervened in the proceedings himself to remain living in Africa – were determinative.

2.3.4 Importance of Keeping Children Together

The relationship a child has to their sibling falls within the category of their emotional needs under Section 1(3) of the Children Act 1989. It is therefore an important factor. However, there is no presumption in favour of or against keeping siblings together.

In the case of CL v AL (2017) EWHC 2154 (Fam), for example, the mother wished to relocate to Australia and the father wished to remain in England. The two brothers concerned wished to live together but did not align on which parent they wanted to live with. The court considered it to be in the best interests of the two brothers to remain living together because of the special relationship between them and the limited options available to them for direct contact to continue if they were not living together. The boys' wishes and feelings were given weight because of their ages and the strength of the opinions they held but ultimately were not determinative. The court instead balanced the question of to whom more harm would be caused by a decision to grant or refuse the mother's application or the father's.

2.3.5 Loss of Contact

The loss of contact between the child or children and the left-behind parent falls within the category of their emotional needs under Section 1(3) of the Children Act 1989.

The factors that affect how much weight is given to this will differ in each case. Some relevant considerations for the court might be:

- the child's wishes and feelings about the loss of contact;
- the genuine nature of the application or any objection to it;
- the family's history (including any abuse suffered);
- the co-parenting relationship between the parties;
- the status quo for contact between the child and the left-behind parent;
- the left-behind parent's ability to financially maintain the child; and
- the practicalities of contact following the relocation (including the costs involved and the enforcement mechanisms available).

This list is non-exhaustive.

It should be noted that there is a presumption in law pursuant to Section 11 of the Children and Families Act 2014 that it will further a child's wel-

fare to have both parents involved in their lives unless there is evidence to the contrary.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

There is no single reason that an applicant can put forward for relocation to which the court will be most sympathetic. The reasons given by the applicant, and the weight attached to each reason, will depend on the facts of each case.

2.3.7 Grounds for Opposition to Relocation

There are no specific grounds in England and Wales for opposing a relocation. Any person with parental responsibility for a child may oppose their relocation by applying for a Prohibited Steps Order and/or a Child Arrangements Order for the child to live with them if they consider that the move would not be in the child's best interests.

2.3.8 Costs of an Application for Relocation

The costs of bringing a relocation application will vary widely between firms in England and Wales. The process can be expensive, however – given that the proceedings are often hotly contested and protracted.

2.3.9 Time Taken by an Application for Relocation

There is a "no delay" principle in proceedings relating to children in England and Wales, which is enshrined in Section 1(2) of the Children Act 1989: "In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child."

Beyond this principle, there is no set timeline for relocation proceedings. The duration of the proceedings will depend on various factors, including – but not limited to – the evidence required and listing availability within the relevant court.

2.3.10 Primary Caregivers Versus Left-Behind Parents

There is no presumption in favour of the primary care provider or the left-behind parent when relocation applications are considered in England and Wales. The welfare of the child will be the court's paramount consideration and this is determined by weighing up the various factors that are relevant to the child's welfare. The weight given to each factor will depend on the specific facts of the case.

2.4 Relocation Within a Jurisdiction

Section 13(1)(b) of the Children Act 1989 applies only to relocations outside the UK (ie, outside England, Wales, Scotland and Northern Ireland). However, if one parent wishes to move a child from their home permanently, they require:

- the permission of all parties with parental responsibility; or
- an order of the court.

Where there is a Child Arrangements Order stipulating the parent with whom a child is to live, that parent does not require the court's permission nor the written consent of any other person with parental responsibility to relocate with the child internally within the UK. If the other parent wishes to object to the relocation, they must apply for a Prohibited Steps Order.

The Court of Appeal found in the case of Re C (Internal Relocation) (2015) EWCA Civ 1305 and (2017) 1 FLR 103 that the approach to be taken in such cases is the same as the approach taken in international relocations. The child's welfare will be the court's paramount consideration.

3. Child Abduction

3.1 Legality

It is a criminal offence to remove a child under the age of 16 from the UK without the court's permission or the written consent of the individuals listed in Section 1(3)(a)(i-v) of the Child Abduction Act 1984, namely:

- the child's mother;
- the child's father (if he has parental responsibility for the child);
- any guardian of the child;
- any special guardian of the child;
- any person named in a Child Arrangements Order as a person with whom the child is to live; and
- any person who has custody of the child.

The exceptions to this being a criminal offence are circumstances where either:

- the parent removing the child believed the other parent had consented or would have consented if they were aware of all the relevant circumstances;
- the parent removing the child had taken all reasonable steps to communicate with the other parent but had been unable to do so; or
- the other parent unreasonably refused to consent.

Furthermore, a parent named as the person with whom a child is to live in a Child Arrangements Order can remove the child from the UK for up to one month under Section 13(2) of the Children Act 1989. Permission from the court or appropriate consent from those with parental responsibility for the child is required for periods longer than this or where there is no Child Arrangements Order in place.

3.2 Steps Taken to Return Abducted Children

If a child is removed from the UK without the appropriate consent or the court's permission, the left-behind parent can invoke the procedure set out in the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the "1980 Hague Convention") if the country from which the child has been removed was a signatory (a "convention country"). The UK is a signatory to the 1980 Hague Convention and it is enshrined in domestic law under the Child Abduction and Custody Act 1985 and the Family Procedure Rules Part 12. It is irrelevant whether the child is wrongfully removed to or retained in a non-contracting state, provided the child's habitual residence was the UK immediately prior to the wrong removal or retention.

The 1980 Hague Convention is intended to protect the child against wrongful removal to or retention within a country that is not their habitual residence. Each contracting state to the 1980 Hague Convention must have a central authority for dealing with facilitating the return of a child who has been wrongfully removed to or retained within that country. The central authority in England and Wales is the Lord Chancellor and the administrative unit associated with this authority is the International Child Abduction and Contact Unit. If a child is removed from their country of habitual residence and taken to England or Wales, the left-behind parent can either contact the International Child Abduction and Contact Unit directly to make an application for the child's return or they may instruct solicitors to make the application on their behalf.

There is a summary procedure for the child's return to their country of habitual residence (and, in some circumstances, to a third state). The application must be made within 12 months

of the child's wrongful removal or retention and a decision on the return must be made within six weeks.

The defences against a return order being made are set out in Article 13 of the 1980 Hague Convention, as follows:

- acquiescence and consent to the removal by the parent requesting the child's return;
- no actual exercise of custody rights by the parent requesting the child's return;
- grave risk of physical or psychological harm or intolerability to the child; and/or
- the child's objections considered in light of their age and maturity.

An applicant seeking the return of their child to England or Wales under the 1980 Hague Convention is entitled to non-means or merits-tested legal aid if they apply for the child's return directly through the International Child Abduction and Contact Unit. Where this procedure is not invoked and the applicant chooses to instruct solicitors to make the application on their behalf, the costs of the proceedings will vary widely between firms. Legal aid may also be available to left-behind parents whose children have been abducted to England or Wales.

If the country from which the child has been removed is not a convention country, then the court still has powers to order its return on an expedited basis but will consider the best interests of the child when considering such an application.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

The UK is a signatory to the 1980 Hague Convention. For further details, please refer to **3.2 Steps Taken to Return Abducted Children**.

3.4 Non-Hague Convention Countries

This does not apply to this jurisdiction, as the UK is a signatory to the 1980 Hague Convention.

USA

Law and Practice

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Krauss Shaknes Tallentire & Messeri LLP (KSTM) is dedicated exclusively to the practice of matrimonial and family law, representing clients in all aspects thereof, including divorce proceedings, paternity disputes, and prenuptial and postnuptial agreements, as well as custody, access, and support issues. The firm often advises high net worth and celebrity clients in sensitive and complex family matters and represents clients in highly contested interstate and international family disputes, including proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Hague Convention on the Civil Aspects of International Child Abduction. KSTM attorneys have achieved landmark victories in federal district and appellate courts, in addition to creating significant new law protecting the interests of parents and children suffering from domestic violence. The firm and its attorneys are recognised consistently in the annual Chambers and Partners' High Net Worth guide as top ranked for family/matrimonial law. KTSM's offices are located in New York City and Greenwich, Connecticut.

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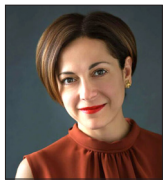

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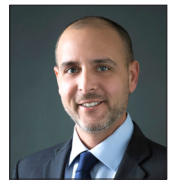

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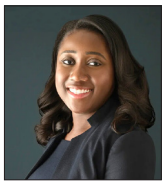
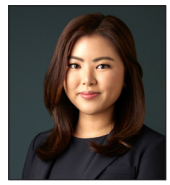


Malissa Osei is a partner at Krauss Shaknes Tallentire & Messeri LLP, where she concentrates her practice in commercial litigation and matrimonial matters. Malissa has experience of litigating complex contract disputes, negotiating prenuptial agreements, and litigating child custody and child support matters. She is a member of the National Urban League Young Professionals, a network of young professionals that works to eradicate social and economic inequalities through community service and volunteer initiatives, and is involved with the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund, the New York Women's Bar Association, and the Metropolitan Black Bar Association. Malissa was named among the National Black Lawyers' Top 40 Under 40.



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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

In the USA, a parent's right to make decisions about their child is protected by the Due Process Clause of the 14th Amendment to the US Constitution.

Although the exact term may vary across the 50 states of the USA, a parent's decision-making power with regard to a child is often referred to as "legal custody". A parent can have sole legal custody or joint legal custody with the other parent, which empowers the parent(s) to make important decisions affecting a child's life, including – but not limited to – a child's education, healthcare, religious upbringing, and extracurricular activities.

1.2 Requirements for Birth Mothers

A birth mother would automatically acquire parental rights or legal custody of the child. A birth mother can lose custody of her child to the authority of the state the mother gave birth in if a court determines that it is in the child's best interests and terminates or suspends the mother's parental rights. By way of example, a state can take protective custody of the child and commit guardianship to an authorised social services agency if parental rights are terminated owing to a finding of neglect, abuse, a newborn testing positive for drugs, etc.

1.3 Requirements for Fathers

A father's parental rights in the USA will depend on his relationship to the child's mother at the time of the child's birth. A father acquires parental rights over a child if the child was born of the marriage between the mother and father. In some states, including New York, a father acquires parental rights over a child if the child was born of a civil partnership between the mother and father.

Alternatively, parental rights can be acquired by unmarried fathers in other ways, including – but not limited to – by:

- being registered as the child's father on the birth certificate;
- obtaining a parentage/paternity order from a court (eg, an "Order of Filiation" in New York);
- entering into a custody agreement with the child's mother;
- obtaining a court order granting joint or sole legal custody; and
- entering into a marriage with the mother.

As regards parental rights for a father in a same-sex relationship, please see **1.4 Requirements for Non-genetic Parents**.

1.4 Requirements for Non-genetic Parents

There are various categories of non-genetic parents in the USA. Each category has different requirements for acquiring parental rights.

Adoption

US citizens who are at least 25 years old can legally adopt a child, subject to any additional requirements pursuant to specific state laws. Such requirements across various states throughout the USA regarding a person's eligibility to adopt a child include, but are not limited to, passing criminal background checks. In New York adoption is a legal proceeding whereby a person acquires the rights and responsibilities of a parent in all respects with regard to the child being adopted. Once the court grants an order of adoption, the parent and adopted child legally establish the relationship of parent and child.

Step-Parents

Step-parents who wish to acquire parental rights and responsibility for their step-children must formally adopt them. Once the step-children are adopted, the non-custodial parent no longer has any parental rights or responsibilities, including child support. Step-parent adoption is the most common type of adoption in the USA.

Same-Sex Relationships

In 2015, the US Supreme Court struck down all state bans on same-sex marriage, and legalised same-sex marriages in all 50 states. Same-sex couples can establish parental rights in various ways, including adoption, pregnancy, and surrogacy. In general, the biological parent automatically has legal custody of their child, and a child born into a marriage is subject to both spouses' legal custody.

Surrogacy

Gestational surrogacy is the process by which a woman agrees to become pregnant via in vitro fertilisation and embryo transfer and to carry and deliver a baby for intended parents, who will be declared to be the legal parents of the child immediately upon birth. Surrogacy is an important family-building option for many families experiencing fertility issues and/or for LGBTQ families.

The USA does not have federal laws regarding gestational surrogacy and thus each state has its own laws (or lack thereof), which vary widely from state to state. In New York, the Child Parent Security Act became law in 2021, which allows for compensated gestational surrogacy pursuant to surrogacy agreements and for parentage orders to be granted prior to the birth of a child. New York law is clear that this only applies to gestational surrogacy, whereby the surrogate's own egg is not used to conceive the subject child. Surrogacy arrangements in which the surrogate is biologically related to the child remain unenforceable in New York and are legally prohibited if the surrogate is being compensated.

1.5 Relevance of Marriage at Point of Conception or Birth

Whether the parents are married at the point of the child's birth, rather than at the point of conception, is relevant in the process of obtaining parental responsibility. In general, if a child is born of the marriage (and, in some states, born of a civil/domestic partnership), the parents of that child automatically obtain parental responsibility for the child.

Under New York law, a child born to parents who are married at the time of the child's birth is presumed to be "the legitimate child of both parents", which is also referred to as the "presumption of legitimacy". In addition, a recent decision by a New York Appellate Division Court held that a child's legitimacy is also presumed for a child born of parents who were not married at the time of the child's birth but who subsequently enter into a civil or religious marriage (see Tiwary v Tiwary, 189 AD 3d 518 (2d Dep't 2020)).

1.6 Same-Sex Relationships

See **1.4 Requirements for Non-genetic Parents**.

1.7 Adoption

See **1.4 Requirements for Non-genetic Parents**.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

When one parent wishes to relocate a child permanently to another country, the relocating parent generally needs the consent of the other

parent and/or any other individual who is a legal guardian of the child.

2.2 Relocation Without Full Consent

If a parent wishes to move a child of the family permanently out of the family home to a new country and they do not have the written consent of the non-relocating parent or legal guardian, the relocating parent may still seek to relocate by applying to a court with jurisdiction over the child. Under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), the court that has jurisdiction over the child is the court in the state where the child has resided for a period of six months or more. The court may grant permission for the relocation if it determines that the move is in the child's best interest.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

When a relocating parent cannot obtain the consent of the non-relocating parent or guardian, they must apply to the relevant state court for permission to relocate. Courts across different states consider various factors when evaluating such requests, all anchored by the paramount concern: the best interest of the child.

In evaluating the request, the court typically considers the following:

- the relocating parent's stated reasons for wanting to move;
- whether the move would significantly enhance the child's educational or financial circumstances to the extent that it outweighs the potential disruption to the child's relationship with the non-relocating parent or guardian;
- the child's age, their relationships with any siblings who are not relocating, and their overall family structure and support in both locations; and
- each parent's capability to meet the child's overall needs, including their ability to foster and facilitate the child's relationship with the other parent or legal guardian.

By way of example, in New York, the relocating parent must make a prima facie case in their application to the court. New York courts often refer to the precedent set by Tropea v Tropea, 87 NY 2d 727, 665 NE 2d 145 (1996), and its progeny to evaluate the specifics of each case. If the court determines that a prima facie case has been established, a hearing will be held where both parties can present evidence supporting their positions on the proposed relocation. Depending on the child's age, the court will appoint an attorney to advocate for the child. Additionally, the presiding judge may arrange to speak with the child in chambers to determine the child's preference regarding which parent they would like to live with. After considering all the evidence, including the child's expressed wishes, the court will issue a decision.

In Massachusetts, if the party seeking relocation is the sole physical custodian of the children, the judge must consider the request under a two-prong test:

- first, whether there is a good reason for the move – ie, a real advantage; and
- second, whether the move would be in the best interests of the children.

Key precedents on relocation from other states include:

- Tropea v Tropea, 87 NY 2d 727, 665 NE 2d 145 (1996) – New York;
- Altomare v Altomare, 77 Mass App Ct 601, 933 N.E.2d 170 (2010) – Massachusetts; and
- in re Marriage of Burgess, 13 Cal 4th 25, 913 P 2d 473 (1996) – California.

2.3.2 Wishes and Feelings of the Child

The courts will generally consider the wishes and feeling a child as an important. However, this is not dispositive and is just one of many factors to be considered.

2.3.3 Age/Maturity of the Child

In New York, there is no set age for a child's expressed wishes and feelings to be the determining factor. The court retains final say over such matters until a child reaches 18, but may allow a child to decide under certain circumstances, taking into account the child's age, intelligence, and maturity level. The older and more mature the child is, the more weight will be given to the child's wishes and feelings. As a practical matter, a typical teenage child will be able to determine their own outcome.

2.3.4 Importance of Keeping Children Together

The courts generally favour keeping children together. However, there are exceptions, particularly where children are deemed old enough to decide with which parent they want to reside.

2.3.5 Loss of Contact

Significant weight is placed on the potential loss of contact between the children and the left-behind parent. The more involved the left-behind parent is in the children's lives, and the more parenting time they exercise with the children, the less likely relocation will be permitted. Conversely, if a left-behind parent rarely sees the children or is not involved in their day-to-day lives, the more likely relocation will be permitted. The court may also consider the extent to which lost contact can be mitigated, such as by granting the left-behind parent additional access during holidays and vacations.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

Applications for relocation are very fact-specific, and no single reason for relocation would be viewed most favourably as a general matter. Some reasons that would engender sympathy by a court, however, would include where relocation is alleged to be necessary to:

- support the child financially;
- improve the child's educational opportunities – for example, where the child has special educational needs that are not adequately addressed by the child's current school district; and
- increase the parent's and child's access to emotional and physical support systems – for example, by moving closer to family members.

2.3.7 Grounds for Opposition to Relocation

There are no specific grounds for opposing a relocation. If a parent's custodial rights would be adversely affected by a relocation, they can set forth various reasons for opposition, with a focus on the child's best interests as the best strategy. Generally, courts are most sympathetic to opposition based on the decrease of frequent and meaningful access between the non-applicant and the child as a result of the relocation, and would consider the degree to which such a decrease would negatively impact the child and/or whether suitable alternative arrangements could be made to reduce the negative impact. The more significant access or parenting time that the non-applicant exercises with the child,

and the more involved the non-applicant is in the child's life, the more likely a court would find that a relocation is not in the child's best interests – although no factor alone is dispositive.

2.3.8 Costs of an Application for Relocation

The costs of an application for relocation will vary greatly depending on the facts and circumstances. Court fees for filing an application are generally not prohibitive. On the other hand, representation by competent counsel can cost tens of thousands of dollars or more and counsel will generally charge fees pursuant to an hourly billable rate.

Additionally, a litigant may need to hire an expert witness or witnesses to file report(s) with the court and testify with regard to any number of issues. Each expert witness will cost several thousand dollars and cause the other party to hire an expert witness to provide a different opinion. By way of example, an application based on better educational opportunities for the child would likely necessitate an expert in education to testify as to the educational benefits of the relocation, and the opposition would need an expert to testify to an opposing viewpoint.

A worthwhile consideration in many jurisdictions is that an application for relocation is considered a custody modification proceeding. In New York, for example, a court has the discretion to award the less-monied party counsel and expert fees to be paid by the more-monied party pursuant to Section 237(b) of the Domestic Relations Law and/or Section 651 of the Family Court Act. Indeed, in New York there is a statutory presumption that fees be awarded to the less-monied party, subject to the discretion of the court based on consideration of the facts and circumstances.

2.3.9 Time Taken by an Application for Relocation

Generally, there is no set time for relocation proceedings – although courts will generally prioritise relocation and other custody-related matters for adjudication, so as not to leave children and their parents or caretakers in limbo. The duration of proceedings will depend on many factors, including the witnesses and evidence required, and the schedule and availability of the court.

2.3.10 Primary Caregivers Versus Left-Behind Parents

No presumption exists in favour of a primary parent or caregiver or the left-behind parent when relocation applications are considered. The best interest of the child is always the paramount consideration, which is determined by weighing the various facts and circumstances presented that are relevant to the child's welfare, including:

- the reasons for the proposed relocation; and
- the effects that the relocation would have on the child's relationship with the left-behind parent.

The weight afforded each factor will depend on the specific facts and circumstances of each case, as – ultimately – will the court's decision.

2.4 Relocation Within a Jurisdiction

Whether a proposed relocation is within the same area, to a different part of the state, or to different country, the same standard applies, which is generally the best interests of the child. The distance of a proposed relocation, however, is a major factor as it will determine the extent to which the proposed relocation will adversely affect the non-applicant's access to the child. The less effect on the other parent's relationship with the child, the more likely the court will allow the relocation. By way of example, if the pro-

posed relocation is to "the other side of town" (and this will minimally affect the non-applicant's ability to spend time with the child), a court will generally allow the relocation. If, however, the proposed relocation is of significant distance – such as to a different part of the state or to a different country – to the extent that the relocation significantly affects the non-applicant's access or parenting time with the child, then the court will be less likely to allow the relocation, subject to its decision as to whether the proposed relocation is in the child's best interests following consideration of the relevant facts and circumstances.

3. Child Abduction

3.1 Legality

In the USA, it is a federal criminal offence – punishable by a fine or up to three years in prison – to remove a child under the age of 16 from the USA with the intent to obstruct the lawful exercise of parental rights. The term "parental rights" refers to the right of physical custody of a child (including joint and sole custody) and whether such rights have been determined by a court order or by a binding agreement between the parents or whether they arise by operation of law.

In addition to this federal law, all states in the USA have enacted their own laws making it a crime to remove the child from the state without a court order or without the permission of the other parent, and with the intention of defeating such parent's custodial rights. In New York, for example, it is "custodial interference in the first degree" for a parent (or another relative) to take a child under the age of 16 with the intent to keep the child away permanently or for a protracted period of time. Custodial interference in the first degree is a Class E felony punishable by up to four years in prison.

Similarly, in California, any "person" who takes a child and "maliciously deprives a lawful custodial of a right to custody… or visitation" may be prosecuted for "deprivation of custody of a child or right to visitation" (Section 278.5 of the California Penal Code). Depending on the degree, deprivation of custody is punishable by up to three years in prison and a fine of up to USD10,000.

3.2 Steps Taken to Return Abducted Children

The USA is a signatory to the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the "1980 Hague Convention"). The 1980 Hague Convention is a multilateral treaty to which more than 100 other countries are signatories. It is designed to protect children internationally from the harmful effects of their wrongful removal by establishing an expedited process for the courts or administrative agencies of the country to which the child is removed to return the child to the child's home country ("state of habitual residence"). The 1980 Hague Convention is not a mechanism for resolving custody disputes and, in that expedited proceeding, custody issues are not to be addressed. Indeed, the fundamental purpose of the 1980 Hague Convention is to ensure – by promptly returning the child – that custodial issues are decided by the country of the child's habitual residence, rather than by the country to which the child was abducted by a parent.

Each of the signatory member states to the 1980 Hague Convention has a Central Authority, which helps to locate abducted children, encourages resolutions of parental abduction cases, and processes requests for the return of children in

what are known as both "incoming" and "outgoing" cases. A proceeding pursuant to the 1980 Hague Convention may be brought directly in the courts of a member state or through the Central Authority of the state of habitual residence, which co-ordinates with the Central Authority of the country the child was taken to. Cases pursuant to the 1980 Hague Convention are brought in the country in which the children are located, seeking return to the state of habitual residence.

In the USA, the 1980 Hague Convention is implemented through the International Child Abduction Remedies Act (ICARA), a federal law enacted by the US Congress in 1988. Section 9001(a)(4) of ICARA mandates a prompt return of children "wrongfully removed or retained" within the definition of the 1980 Hague Convention, unless one of the narrow exceptions to the return applies. ICARA further establishes a uniform process for "prompt return" and directs that states must act "expeditiously" to return children to their "state of habitual residence". The Office of Children's Issues within the Department of State serves as the Central Authority for the US government.

If a child is removed from the USA without the appropriate consent or an order of the court permitting such removal, the left-behind parent can file a petition for the return of the child under the 1980 Hague Convention, provided that the country to which the child has been removed is a signatory to the 1980 Hague Convention. The Office of Children's Issues will assist in locating the child and with transmitting the request for the return of the child to the country where the child is located and with locating counsel in such country.

If the country to which the child has been taken is not a signatory to the 1980 Hague Convention (eg, China, Russia or India), the Office of Children's Issues may still be able to assist with the return of the child. However, this process if far more complicated and the resources of the Office of Children's Issues are more limited.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

When a child is taken to the USA from another country that is a signatory to the 1980 Hague Convention, the left-behind parent seeking the return of the child will need to file a petition under the 1980 Hague Convention. The petition can be filed in the child's state of habitual residence and will be transmitted through such country's Central Authority to the USA. Pursuant to the 1980 Hague Convention, a proceeding for the return of the child must be filed in the country where the child is located.

The Office of Children's Issues maintains a network of attorneys who provide legal assistance to the parents seeking the return of their children and will assist with obtaining legal representation. Depending on the applicant's financial circumstances, these attorneys may accept incoming 1980 Hague Convention cases for a reduced fee or no fee. Eligible Hague applicants may request pro bono (no fee) or reduced fee legal assistance and the Office of Children's Issues will also assist with interpreting. There is, of course, no guarantee that an attorney will volunteer to take the case. In addition, the Office of Children's Issues will provide a list of full-fee attorneys upon request. These attorneys can work on incoming 1980 Hague Convention cases and some may work on non-Hague cases as well.

Ultimately, a petition for the return of the child under the 1980 Hague Convention must be filed with the court. In the USA, state and federal courts have concurrent jurisdiction to hear such

cases and make a determination. The courts in the USA take these proceedings very seriously and will order the return the child unless the parent opposing such return can establish one of the narrow defences. The 1980 Hague Convention provides five narrow exceptions to return:

- one year and well settled defence – one year has passed and the child is now well settled in the new environment;
- consent or acquiescence – the parent seeking the child's return consented or otherwise acquiesced to the removal or retention;
- grave risk or intolerable situation – the return poses a grave risk that the child will be exposed to "physical or psychological harm" or otherwise placed into an "intolerable situation";
- mature child objection – the child objects to return and is mature enough to have their objection considered; and
- human rights and fundamental freedoms – the return contravenes basic human rights and fundamental freedoms.

All of these defences are narrowly construed and the burden is on the parent opposing the return to establish that one of the defences applies.

The proceedings under the 1980 Hague Convention are always expedited and take priority over other cases. Even though the 1980 Hague Convention calls for the child's return within six weeks, in practice, these cases may take several months (and sometimes longer). Free legal assistance is not routinely available to the parents opposing the return and legal costs may become quite high. Moreover, pursuant to Section 9007 of ICARA, although the parent seeking the return of the child is initially responsible for all costs in connection with such petitions, including travel and legal costs), if the return is granted, ICARA permits the court to reallocate all such costs to the respondent.

For further information, see the May 2022 Report of the US Department of State on Compliance With the Hague Convention and the HCCH Global Report – Statistical Study of Applications Made in 2021 Under the 1980 Child Abduction Convention.

3.4 Non-Hague Convention Countries

This is not applicable in this jurisdiction. The USA is a signatory to the 1980 Hague Convention.

Trends and Developments

Contributed by:
Valentina Shaknes
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Krauss Shaknes Tallentire & Messeri LLP (KSTM) is dedicated exclusively to the practice of matrimonial and family law, representing clients in all aspects thereof, including divorce proceedings, paternity disputes, and prenuptial and postnuptial agreements, as well as custody, access, and support issues. The firm often advises high net worth and celebrity clients in sensitive and complex family matters and represents clients in highly contested interstate and international family disputes, including proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Hague Convention on the Civil Aspects of International Child Abduction. KSTM attorneys have achieved landmark victories in federal district and appellate courts, in addition to creating significant new law protecting the interests of parents and children suffering from domestic violence. The firm and its attorneys are recognised consistently in the annual Chambers and Partners' High Net Worth guide as top ranked for family/matrimonial law. KTSM's offices are located in New York City and Greenwich, Connecticut.

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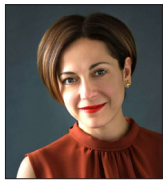

Valentina Shaknes is a founding partner at Krauss Shaknes Tallentire & Messeri LLP, who has practised exclusively in matrimonial and family law for nearly 20 years. Valentina represents clients in a variety of matrimonial matters (both domestic and international) involving equitable distribution and custody disputes, child and spousal support, and prenuptial and postnuptial agreements – with special expertise in international child abduction and custody disputes, including proceedings arising under the Hague Convention on the Civil Aspects of International Child Abduction. She is an active certified divorce mediator and a certified parent co-ordinator. Valentina is consistently ranked by Chambers and Partners' High Net Worth guide as a top family/matrimonial lawyer.

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New Developments at the Intersection of Domestic Violence and the Hague Convention on International Child Abductions: a Historic Forum in South Africa

From 18 June 18 to 21 June 2024, the Permanent Bureau of the Hague Conference on Private International Law (*Hague Conference – Conférence de La Haye*, or HCCH) held the first-ever Forum on Domestic Violence and the Related Operation of Article 13(1)(b) of the Hague Convention on Civil Aspects of International Child Abduction (the "Forum on Domestic Violence", or "the Forum"). Co-hosted by the South African government and the University of Pretoria's Centre for Child Law in Sandton, South Africa, the Forum brought together more than 100 participants, including legal practitioners, judges, psychological experts, policymakers and advocates, along with – perhaps most importantly – survivors of domestic violence who shared their experiences living through a Hague Convention proceeding. This historic event focused on the intersection of domestic violence and Article 13(1)(b) of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the "1980 Hague Convention"), which allows a court to refuse the return of a child if such a return would expose the child to a "grave risk of physical or psychological harm".

The significance of the Forum cannot be overstated. Domestic violence in the context of the 1980 Hague Convention presents complex challenges for the legal system. The original salutary goal of the 1980 Hague Convention – namely, to return children wrongfully removed from their home country – seemed completely unobjectionable. Yet, in practice, when children are moved cross-border to protect them from abuse, the wisdom of their return becomes questionable.

Indeed, Article 13(1)(b) cases now represent the majority of the 1980 Hague Convention cases that go to trial, and harm from domestic violence is invoked in the great majority of those. Although the drafters of the 1980 Hague Convention anticipated that the typical abductor would be a non-custodial parent disappointed by or fearing an adverse custody decision, practice has shown that more than 75% of the taking parents are mothers – the vast majority of whom (94%) are the primary carers of their children.

Domestic violence is inherently complex as compared to other forms of violence. Not only are its victims often reluctant to report their abusers, but cultural norms and societal attitudes play a crucial role in what counts as impermissible violence between family members in the first place, as well as how a country responds to it. While any modern society considers certain acts – such as forced sex or the corporal punishment of women or children –criminal in other contexts, it may deem them acceptable if they happen at home, between members of a family.

Thus, for a country to provide victims of domestic violence with effective protection, there must be a proper recognition of the problem not only at the national level – leading to the adoption of laws specifically tailored to address domestic violence – but also an implementation and proper enforcement of such laws at the local level, through the court system, state enforcement and social services agencies. Officers of these systems must all be trained to recognise and understand the problems and complexities of domestic violence, and be willing and equipped to help victims of this abuse.

However, the system for addressing domestic violence varies from country to country, often dramatically. This variation poses an especially difficult challenge for courts in international child abduction cases tasked with ordering measures designed to protect a child upon being returned to the child's home country. The issuing court often lacks the necessary understanding of the legal system in the child's country of habitual residence and may be powerless to enforce these measures once the parties leave its jurisdiction.

This article provides a brief overview of the 1980 Hague Convention and the Article 13(1)(b) defence in the context of domestic violence. It also highlights the main points of discussion and the takeaways from the Forum.

1980 Hague Convention and Article 13(1)(b) defence

The 1980 Hague Convention is a multilateral treaty to which the USA and more than 100 other countries are signatories. It is designed to protect children internationally from the harmful effects of their wrongful removal by establishing an expedited process for the courts or administrative agencies of the country to which the child is removed to return the child back to the child's home country ("state of habitual residence"). The 1980 Hague Convention is not a mechanism for resolving custody disputes and, in that expedited proceeding, custody issues are not to be addressed. Indeed, the fundamental purpose of the 1980 Hague Convention is to ensure that – by promptly returning the child – custodial issues are decided by the child's state of habitual residence, rather than by the country to which the child was abducted by a parent.

Each of the signatory member states of the 1980 Hague Convention has a Central Authority, which helps to locate abducted children, encourages resolutions of parental abduction cases, and processes requests for the return of children in what are known as both "incoming" and "outgoing" cases. In the USA, the Office of Children's Issues within the Department of State serves as the Central Authority for the US government.

The 1980 Hague Convention requires that a child determined to have been "wrongfully removed or retained" be promptly returned. The taking or retention is considered "wrongful" if the petitioner proves by a preponderance of the evidence that:

- the child was removed from or retained outside the child's country of habitual residence;
- the removal or retention was in breach of the petitioner's custody rights; and
- those custody rights were actually exercised at the time of removal or retention or would have been exercised but for the removal or retention.

If this burden is met, the 1980 Hague Convention requires that the child be returned.

Despite the emphasis on the return, the 1980 Hague Convention also recognises that "the interests of children are of paramount importance". As the Explanatory Report to the 1980 Hague Convention explained, "the interest of the child in not being removed from its habitual residence… gives way before the primary interest of any person in not being exposed to physical or psychological danger…". Guided by this consideration, the 1980 Hague Convention allows a court of a country to which a child has been wrongfully removed to refuse the mandatory return under certain circumstances, including – in the Convention's Article 13(1)(b) – where such return would expose the child to a "grave risk of physical or psychological harm or otherwise place the child in an intolerable situation". This is known as the "Article 13(1)(b) defence" or the "grave risk of harm" defence.

Most cases invoking the "grave risk of harm" defence arise in the context of domestic abuse. In the USA, the International Child Abduction Remedies Act (ICARA) – through which the 1980 Hague Convention is implemented – adds an extra burden on the parent opposing the return, requiring that the grave risk of harm be proven by "clear and convincing evidence". It is a high bar, which until recently could be met only in cases of severe physical abuse directed at the child. The USA is the only signatory to the 1980 Hague Convention to impose this heightened evidentiary standard.

Domestic violence in the USA: a complex legal landscape

Domestic violence is a complex, persistent and pervasive problem. The response to it across the country is complicated, in part, by the lack of a uniform definition and understanding of what constitutes domestic violence. Mental health professionals define domestic violence as a long-standing pattern of control and intimidation in the context of an intimate relationship. It is recognised that this dynamic in a relationship is created and maintained through multiple vehicles of control across many areas of the victim's personal life, including physical, sexual, emotional and psychological abuse, medical neglect, financial and legal manipulation, social isolation, threats to a child of the relationship, and threats to deploy others in service of the abuser's goals.

In contrast, there is no one accepted legal definition in the USA. Each state uses its own standards and procedures for addressing domestic violence. In many US states, the legal definition of domestic violence is narrowly focused on physical abuse and thus neglects other forms of control and intimidation, such as emotional, psychological or financial abuse. These forms of non-physical abuse are often harder to prove in court, yet they are just as damaging to victims, particularly when children are involved. The variability in state definitions and the often-narrow focus on physical violence contribute to the legal system's inadequate response to the complexities of domestic violence.

California, for example, has one of the broadest definitions of domestic violence, which includes physical harm, the threat of harm, and

behaviours such as harassment, stalking, and the destruction of personal property. The state's definition also encompasses both current and former spouses, cohabitants, and individuals in dating relationships, as well as a child of a party. Similarly, in Florida, domestic violence is defined as any assault, battery, sexual assault, or other forms of physical harm between family or household members. Florida law also allows for protective orders based on the reasonable belief of imminent danger of becoming the victim of any act of domestic violence. This takes into account numerous factors, including prior attempts to harm and patterns of abusive, threatening, intimidating or controlling behavior.

Even though South Carolina's definition of domestic violence is more limited, focusing – like Florida – primarily on physical harm or the threat of harm between household members, it does also consider a reasonable fear of imminent peril (although it does not explicitly include non-physical forms of abuse such as emotional or psychological coercion). Conversely, Alabama's legal definition is more restrictive still, breaking domestic violence down into three statutory degrees. Alabama's first two degrees of domestic violence are the most restrictive and extreme, primarily emphasising physical violence and specific criminal acts such as assault or sexual abuse, with less emphasis or recognition to emotional or physical violence. Its third degree of domestic violence recognises not only physical injury, but also menacing (or the threat of physical injury), and the victim can be connected to a defendant merely by dating. And New York does not have any explicit statutory definition of domestic violence at all – although it is recognised through various family offences and real property matters.

The US legal system's historical tendency to minimise or overlook allegations of domestic violence, especially when it involves non-physical forms of abuse, has further compounded these issues. Courts often require evidence of severe physical harm to the child, ignoring the broader spectrum of abuse that can have equally devastating effects on the victim and their child.

The lack of uniformity leads to a patchwork of protections that can vary dramatically depending on the jurisdiction. The inconsistency in the definition of domestic violence is even greater at an international level, where it is further complicated by the divergent legal, social and cultural norms and standards. This lack of common understanding poses significant challenges domestically and internationally in the context of the 1980 Hague Convention, with the outcome of a particular case often depending on which US state the case is litigated and which country constitutes the child's "state of habitual residence". In essence, the same victims subjected to the same abuse may or may not be protected depending in large part on the forum and the victims' country of origin.

The legal community has also been slow to recognise the impact of domestic violence on children, especially in cases where the children are not direct targets of the violence but are exposed to it. This lack of recognition has contributed to the misguided reliance on protective measures in 1980 Hague Convention cases, even when domestic violence is a factor.

Moreover, until recently, even after finding a grave risk of harm, the US courts required that the parent opposing the return prove that there were no "protective measures" that would mitigate such risk. Protective measures, also frequently referred to as "ameliorative measures"

in court decisions and scholarly articles, are usually in the form of voluntary undertakings by the left-behind parent. They typically consist of promises to provide financial assistance, stay away from the other parent and the child, and not co-operate in the criminal prosecution of the "abductor" parent. Such promises may be reduced to an order issued by the court deciding the return petition, with mirror orders in the country of the child's habitual residence. The insistence on protective measures after finding a grave risk of harm underscores the emphasis US courts placed on granting the return petition. The Permanent Bureau's Guide to Good Practice on Article 13(1)(b) also strongly recommends protective measures when considering returning children to their habitual residence.

Research shows, however, that abusers are prone to recidivism and are likely to ignore or defy interventions (such as court orders) intended to mitigate the recurrence of abuse. Many domestic violence offenders revert to their abusive behavior within months following law enforcement or social service interventions. Thus, reliance on protective measures to facilitate return in cases involving domestic violence despite a finding of grave risk reflects a fundamental lack of understanding of the complexity of domestic violence and the needs of its victims (the children and their caretaker parents), putting children in real danger.

Three studies of the effectiveness of protective measures provide ample reason to be hesitant to ever rely on such measures. By way of example, the Reunite International Child Abduction Centre's study of cases in the UK revealed that two-thirds of the undertakings issued – including all of those focused on a child's safety upon return – were not implemented in the country of habitual residence (see The Outcomes for Children Returned Following an Abduction (Reunite International Child Abduction Centre, UK, 2003)). Even when judges issued mirror orders in the child's home country, only one in five of those mirror orders was implemented as planned.

Research into US incoming cases has also revealed that judges and attorneys were skeptical of the enforcement of these orders by another country's courts and that mothers who returned with their children to the country of habitual residence would frequently face violations of previously agreed undertakings by their abusive ex-husbands or find that mirror orders were seldom enforced. Finally, in the recent online survey conducted by two UK charities, mothers from a number of countries reported that protective measures – even those in which mirror orders were obtained – were not enforced or were very difficult to enforce.

Fortunately, in the USA, there has been a significant shift away from reliance on protective measures. In 2022, the US Supreme Court recognised the complexity of domestic violence and the limitation of US courts to issue orders that would protect victims of domestic violence overseas. In the seminal case of Golan v Saada, 142 S Ct 1880 (2022) ("Golan"), the US Supreme Court rejected the appropriateness of protective measures in cases involving domestic violence: "A court may decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave. Sexual abuse of a child is one example of an intolerable situation. Other physical or psychological abuse, serious neglect, and domestic violence in the home may also constitute an obvious grave risk to the child's safety that could not readily be ameliorated. A court may also decline to consider imposing ameliorative

measures where it reasonably expects that they will not be followed."

Main takeaways from the forum on domestic violence

Several main themes emerged in discussion at the Forum.

First, while there was no immediate agreement on whether victims of domestic violence and their children are already sufficiently protected under the 1980 Hague Convention, there was a uniform recognition that domestic violence harms and endangers children. Decades of research have clearly established that exposure to domestic violence, including adult-to-adult violence, has significant negative physical and psychological outcomes for children. These outcomes include depression, anxiety, sleep disturbances, lower social and emotional competence, poorer academic performance, and a higher tolerance for aggression and violence. The effects are particularly severe when the violence is directed at the child's primary caregiver.

Second, the fragmented legal framework results in a child's exposure to domestic violence being viewed differently depending on the location in which the case is heard. Some member states may prioritise the child's well-being and recognise the harmful impact of witnessing domestic violence, whereas others may focus solely on direct physical harm to the child. This inconsistency can lead to vastly different outcomes, even when the facts of the case are similar. By way of example, if a protective measure is issued in one state with a broad definition of domestic violence, but the child is returned to a state or country with a narrower definition or weaker enforcement mechanisms, the protection may be rendered ineffective. This disconnect between different legal jurisdictions can leave victims and their children vulnerable to ongoing abuse.

This is a highly unsatisfactory outcome. There is no doubt that a uniform definition of domestic violence in the 1980 Hague Convention context (both nationally and internationally) – a definition which is expansive enough to encompass all of the vehicles of abuse, including physical, psychological, emotional, financial and legal – would be of great benefit to the implementation of the Article 13(1)(b) defence.

Third, the appropriateness of reliance on protective measures is another issue that was discussed in detail at the Forum. Although no consensus was reached, given the prevalence of the protective measures, it was an important conversation to begin. The international community should take note of the US Supreme Court's decision in Golan and prioritise the safety of the children over their return. As Secretary General Christoph Bernasconi specifically acknowledged in his closing remarks, "it is not about the sheer number of returns but really about the correct application of the [1980 Hague] Convention". Given the volume of evidence that protective measures are ineffective and do not adequately protect the victims, reliance on these measures is misplaced and should be discontinued.

The journey toward adequately protecting victims of domestic violence in international child abduction cases is far from complete. Importantly, the conversation will continue in 2025, when the Forum will convene again – this time hosted by the Brazilian government. Ongoing education, legal reform, and societal changes are essential to ensuring that the legal system can effectively address these issues and protect those most vulnerable, while balancing important competing interests.

USA – ARKANSAS

Law and Practice

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Bundy Law is a regional law firm headquartered in Tulsa, Oklahoma. The firm's Arkansas office is located in Bentonville. Its trial attorneys advise on high-net-worth financial disputes, including the valuation and division of professional practices, mineral interests, farms, ranches, artwork, and investment portfolios. Kathleen Egan, who is a partner, leads the appellate practice in Oklahoma and Arkansas. Bundy Law employs next-generation technology, with intake, discovery, trial preparation, and briefing processes enhanced by artificial intelligence. Ranked Band 1 in the Chambers Family/Matrimonial: High Net Worth Guide, Bundy Law is well suited for high-value, high-stakes financial cases and appellate matters involving novel issues.

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

Arkansas statutes do not specifically articulate the rights of parents concerning their children. Parental rights in Arkansas have been affirmed through case law in appellate decisions. Arkansas appellate courts have confirmed the United States Supreme Court precedent holding that the US Constitution protects the fundamental rights of parents to direct and govern the care, custody and control of their children. The law presumes the actions of fit parents concerning their minor children are made in the best interests of the children.

1.2 Requirements for Birth Mothers

Arkansas law provides that the mother of a child born out of wedlock has custody of her child for the duration of the child's minority unless a court enters an order placing custody of the child with someone else (Arkansas Code Ann. Section 9-10-113).

1.3 Requirements for Fathers

Fathers have rights equal to mothers with respect to their minor children. In divorce actions, child custody decisions are made without regard to the gender of either parent. Recent statutory developments confirm that joint custody is presumed for both fathers and mothers, and that presumption may be rebutted by a heightened standard of clear and convincing evidence. Unmarried fathers enjoy the same presumptions of custody and access when a judicial action for paternity is commenced.

1.4 Requirements for Non-genetic Parents

Non-genetic parents, including step-parents, may have rights of access to a minor child in special circumstances. Arkansas law recognises the in loco parentis doctrine, which focuses on the relationship between the child and the non-genetic person seeking judicial recognition of their rights of custody and access. The judicial inquiry is to determine the bond between the child and the third party or non-genetic parent. Evidence of pre-separation intent or shared agreement to parent the child is an important element for the non-genetic parent to show the court.

1.5 Relevance of Marriage at Point of Conception or Birth

Married parents share equal rights and responsibilities to their minor children. Neither parent has an advantage based on their gender. In 2021, the legislature passed a law creating a presumption in favour of joint custody for all child custody orders.

1.6 Same-Sex Relationships

The state is obligated to issue birth certificates to same-sex married parents. Following birth, the non-genetic parent may formally adopt the minor child to fully establish their parental rights and legal interests. Same-sex partners should memorialise in writing their agreement to have children and co-parent.

1.7 Adoption

Adoptions may be granted only after the adoptive parents have complied with rigorous statutory requirements. The prospective adoptive parents and adult household members must all go through extensive state and federal criminal background checks. An extensive home study may be required in certain adoptions. With certain exceptions, a comprehensive report concerning the child's health, genetic and social history must be generated and filed prior to entry of the adoption decree.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

The consent of the non-custodial parent is necessary for the custodial parent to relocate with a minor child. If the non-custodial parent does not consent to the proposed relocation, they must file a formal request for denial of a proposed relocation with the appropriate court having competent jurisdiction. The Arkansas Supreme Court has said that third parties, such as grandparents, are not considered beneficiaries of custody agreements, and therefore cannot contest or object to the relocation of a minor child.

2.2 Relocation Without Full Consent

Either parent may initiate a legal proceeding to authorise or deny a proposed relocation. Typically, relocation cases are commenced by the non-custodial parent, who, knowing the other parent is attempting relocation, seeks a change of custody. In other situations, the custodial parent has already relocated, forcing the non-custodial parent to file a contempt application. Relocation proceedings can also be commenced by the custodial parent filing a petition for permission to relocate.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

The standard for determining the issue of relocation differs depending on the underlying custodial arrangement. In cases where the primary or sole custodial parent is seeking relocation, guidance was provided in Hollandsworth v Knyzewski, 353 Arkansas 470, 109 S.W.3d 653 (2003). In Hollandsworth, the Arkansas Supreme Court created a presumption in favour of the custodial parent's request for relocation. In creating this presumption, the Supreme Court shifted the ultimate burden of proof to the non-custodial parent. The parent opposing the move must prove that the proposed relocation will negatively impact the minor child.

Singletary v Singletary, 2013 Arkansas 506, 431 S.W.3d 234 (2013) distinguished the relocation standard for situations in which both parents share joint custody of the minor child and one seeks to relocate. The Court in Singletary explained that a separate analysis is required in joint custodial situations, because when both parents spend equal time with the child, one relationship should not take precedence over the other. In situations such as these, the trial court must first analyse whether a material change in circumstance has occurred, and if so, whether a change of custody is in the best interests of the minor child.

Recognising that custodial arrangements are not always spelled out in black and white, the Arkansas Supreme Court provided additional guidance in Cooper v Kalkwarf, 2017 Arkansas 331, 532 S.W.3d 58. The Cooper court clarified the holding in Hollandsworth by finding that the presumption discussed above applies not only to primary custodial parents, but to those parents that spend significantly more time with the child then the other parent. Likewise, the Cooper court noted that the Singletary analysis can apply to cases that do "not necessarily involve a precise '50/50' division of time" but also to those situations where "parental influence and commitment, involvement in the child's daily activities, and responsibility for making decisions on behalf of the child" have been demonstrated. (532 S.W.3d 58, 67.)

As with all cases involving minor children, the primary concern is still the best interests of the

minor children. In determining whether to allow the proposed relocation, the trial court may consider the following:

- reason for the relocation;
- educational, health and leisure opportunities in the new location;
- non-custodial parent's current visitation and communication schedule and the potential impact on that schedule if the proposed relocation is allowed;
- effect of the move on the extended family relationships; and
- preference of the minor child, if the child is of sufficient age and maturity.

In situations where the primary custodial parent seeks relocation and Hollandsworth applies, relocation alone is not a material change in circumstances that would warrant a change in custody. (See, Wells v Wells, 2024 Arkansas App. 348 (2024).)

2.3.2 Wishes and Feelings of the Child

The trial court may consider the preference of the minor child when determining whether to permit a request for relocation. In Arkansas, there is no specific age at which a court may listen to or consider the wishes and preferences of the minor child. The court must make a determination regarding the child's mental capacity, maturity and age on a case-by-case basis. While the wishes and desires of the minor child are not binding on the trial court, they should be properly considered in light of other evidence produced at trial.

2.3.3 Age/Maturity of the Child

The judge must determine on a case-by-case basis whether the minor child is of sufficient age, maturity and mental capacity to have a reasonable opinion about the proposed relocation. There is no specific age at which the court may consider the minor child's opinion. There have been cases in which the trial court has found that a 12-year-old is not of sufficient maturity to form a reasonable opinion. Typically, the older the child is, the more likely the court is to find the child of sufficient age and maturity. It is important to note that, even if the court finds the child to be of sufficient age and maturity to form a reasonable opinion regarding the relocation, the court is not required to grant that child's request but, rather, must thoroughly consider other best interest factors.

2.3.4 Importance of Keeping Children Together

In Arkansas, both the legislature and the courts have recognised the unique bond between siblings and, given that bond, have prohibited sibling separation absent exceptional circumstances. However, this prohibition does not exist for half or step siblings. As noted in the appellate case of Respalie v Respalie, 25 Arkansas App. 254, 756, S.W.2d 928 (1988), courts "cannot always provide flawless solutions to unsolvable problems, especially where only limited options are available".

2.3.5 Loss of Contact

One of the specific things the trial court must consider when deciding a relocation issue is the impact that the relocation would have on the non-custodial parent's visitation and communication with the minor child, as well as the impact that the move would have on the child's relationship with extended family members. While the impact on the non-custodial parent's visitation with the minor child is a factor the trial court must consider, that issue alone is not dispositive of the issue. The trial court must also consider whether an alternative visitation schedule exists which could limit the loss of contact.

In the case of Benedix v Romeo, 94 Arkansas App. 412, 232 S.W.3d 493 (2006), the custodial parent requested permission to relocate four and a half miles from Conway, Arkansas. Following relocation, the father's visitation with the minor child would remain the same except for his mid-week overnight visit with the child. The Court of Appeals reversed the trial court's ruling denying the mother's request for relocation, finding that there was insufficient evidence to support the trial court's finding that an alternative visitation schedule could not provide for meaningful visitation with the minor child.

In Cox v Cox, 2019 Arkansas Appeal 197, 574 S.W.3d 711, 717 (2019) the court acknowledged that the Hollandsworth presumption presupposes that visitation and communication with the non-custodial parent will be impaired as a result of relocation, but as long as meaningful visitation continues, then the presumption in favour of relocation is not rebutted.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

There is a presumption that the custodial parent's request for relocation should be granted and is being made in the best interests of the minor child. Courts are particularly sympathetic to parents seeking relocation for employment and financial considerations presumably because these considerations would negate any claim that the parent seeking relocation was doing so solely to interfere with visitation.

2.3.7 Grounds for Opposition to Relocation

One of the most powerful grounds for opposing relocation is that the custodial parent is relocating solely to interfere with the non-custodial parent's visitation with the minor child and/or for purposes of alienation. In Sill v Sill, 94 Arkansas App. 211, 228 S.W. 3d 538 (2006), the mother filed a petition to relocate to Miami, Oklahoma. At trial, the mother testified that she actually earned less at her job in Oklahoma than she did in Arkansas prior to relocation. Following trial, the court found that the father had rebutted the relocation presumption and that the mother attempted relocation solely for the purpose of interfering with the father's visitation and alienating the minor children. The Arkansas Court of Appeals affirmed the trial court's decision.

Similarly, in Alsina v Hicks, 2023 Arkansas App. 485, 678 S.W.3d 449 (2023), the mother, who had primary custody of the minor child, sought to relocate to Seattle, Washington, claiming she had obtained employment there. Father objected and moved for a change of custody. In the trial court's order awarding father custody and denying mother's request to relocate, it found numerous instances of mother trying to interfere with father's relationship with the minor child and cut him out of the child's life. The trial court found that the mother's requested relocation, "combined with the Court's belief that the mother's behaviour is only going to continue, would destroy the relationship between [father] and the minor child." (678 S.W. 3d at 451.) The Arkansas Court of Appeals affirmed the trial court's decision.

2.3.8 Costs of an Application for Relocation

The cost of relocation proceedings, like the cost of all family law matters, is difficult to predict given the unpredictability of the behaviour of the opposing party. If the parties are able to negotiate and/or mediate the issue of relocation and come to an agreement relatively quickly, the costs will be less than those cases that are actively litigated and result in a trial before the court.

2.3.9 Time Taken by an Application for Relocation

While there is no specific time frame within which the court must decide or hear a relocation request, Arkansas courts make a concerted effort to deal with family law matters expeditiously. It is important for litigants to keep the court informed if there is a specific proposed date for relocation so that the court can attempt to hear the matter prior to that date.

2.3.10 Primary Caregivers Versus Left-Behind Parents

As a result of the Supreme Court creating the presumption in favour of the party seeking relocation in the Hollandsworth v Knyzewski case, trial courts are necessarily more sympathetic to custodial parents. Notwithstanding the presumption, trial courts are still required to consider the reason for relocation as a factor in reaching a determination regarding relocation. If the trial court finds that the custodial parent is relocating for purposes of interfering with visitation, it can deny that parent's request.

2.4 Relocation Within a Jurisdiction

Arkansas law makes no distinction between a parent seeking to relocate to a different state or to another county within the state. While the presumption and factors remain the same for either an international or a domestic relocation, providing continued contact between the child and the non-custodial parent could potentially be more challenging for an international relocation, resulting in greater scrutiny of the proposed relocation by the trial court.

3. Child Abduction

3.1 Legality

A parent absconds with a child either by taking the child without the consent of the other parent when there is no custody order in place or by violating a custody agreement between the parents. If the latter occurs – a parent leaves the jurisdiction with a child in violation of the terms of a custody agreement and order – the removing parent may be charged with contempt of court. Most custody orders prohibit either parent from taking the child to another state without the consent of the other parent. If found guilty of contempt of court, the parent could be sentenced to a period of up to six months in jail.

If there is no custody order in place, the situation becomes more nuanced, as the absconding parent has not technically violated any court order or law. The left-behind parent may file an emergency custody application if there is a reasonable belief that the child is in danger. The parent may also seek a writ of habeas corpus requiring the return of the child.

3.2 Steps Taken to Return Abducted Children

If a parent takes a child to another country without the consent of the other parent, a Hague proceeding would need to be commenced. In that situation, the parent should file a petition for the return of the child under the Hague Convention either in the court in the country where the child has been taken, in the court in the country of the child's habitual residence, or both. It is important to commence these proceedings within one year of the abduction, as it can be more difficult to get a court to return the child after they have become well established in the new jurisdiction.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

The United States of America is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. Arkansas has adopted the Uniform Child Custody Jurisdiction and Enforcement Act, which provides for the enforcement and return of the child under the Hague Convention. The United States Department of State, Office of Children's Issues in the Bureau of Consular Affairs is the Central Authority to carry out the duties of the Hague Convention.

The International Child Abduction Remedies Act (ICARA) is United States federal law implementing the Hague Convention on the Civil Aspects of International Child Abduction. It provides that federal district courts have concurrent jurisdiction with state courts in child abduction cases. A petition or complaint for the return of a child may be filed in an Arkansas circuit court or in the appropriate federal district court.

Once a Hague petition is filed, the court is required to act expeditiously. If a decision has not been made within six weeks of filing, the Central Authority can request a statement asking for the reason for the delay. When deciding the case, a court is empowered to take judicial notice of the law and decisions in the state of the child's habitual residence.

Arkansas courts have confirmed state policy to rigorously apply and follow the Hague principles of immediate return of the child. Both circuit and appellate courts give careful attention to the treaty's requirements and its underlying philosophy, and case law reflects that the courts are not easily distracted by attempts of wrongfully retaining parents to make inappropriate child custody or best interests arguments inapplicable in a Hague analysis.

3.4 Non-Hague Convention Countries

The United States of America is a signatory to the Hague Convention.

USA – MISSOURI

Law and Practice

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

Missouri's appellate courts have long recognised the fundamental liberty interests of parental rights, familial integrity and child rearing – in re K.A.W., 133 S.W. 3d 1 (Missouri 2004). State intervention in the parent-child relationship must involve procedures meeting due process requirements. Missouri custody law expressly states that it is the public policy of Missouri to encourage parents to participate in decisions affecting the health, education and welfare of their children – Missouri Revised Statute § 452.375.4.

1.2 Requirements for Birth Mothers

A natural mother may establish the parent-child relationship by proof of her having given birth to the child – Missouri Revised Statute § 210.819.

1.3 Requirements for Fathers

A man is presumed to be the natural father of a child if he is or was married to the child's natural mother and the child was born during the marriage or within 300 days after the marriage was terminated by death, annulment, declaration of invalidity, dissolution, or a decree of separation. This presumption and the 300-day time period extends to unmarried fathers who attempted to legally marry the child's natural mother but the attempted marriage was invalid for some reason. A man is also presumed to be the father of a child if he acknowledges his paternity in writing, he is named with his consent as the child's father on the child's birth certificate, he is obliged to support the child, or a blood test shows a specific probability of paternity – Missouri Revised Statute § 210.822. A signed "acknowledgement of paternity" form is also considered a legal finding of paternity – Missouri Revised Statute § 210.823. A legal action to declare the existence or non-existence of a father and child may be brought by a variety of interested parties, including the man in question, the mother, the child, and the child's legal custodian – Missouri Revised Statute § 210.826.

1.4 Requirements for Non-genetic Parents

An adoptive parent may establish the parent and child relationship by proof of adoption – Missouri Revised Statute § 210.819. Non-genetic parents from same-sex relationships face an extraordinarily complicated and challenging analysis under Missouri's third-party custody rights statutory provision, Missouri Revised Statute§ 452.375.5(5)(a) and appellate case law interpreting it – in re T.Q.L., 386 S.W.3d 135 (Missouri banc 2012). A non-genetic parent is considered a third party who must demonstrate that each parent is unfit, unsuitable or unable to be a custodian of the welfare of the child, and that it is in the best interests of the child to award custody to the third party. The petitioning third party must rebut the legal presumption that the biological parents are fit, suitable and able custodians of their children and a child's welfare is best served by awarding custody to their parents. Then, the non-genetic parent must prove that he or she is "suitable and able to provide an adequate and stable environment for the child". The trial court must first determine whether the third party seeking custody has rebutted the parental presumption before the court may examine the factors relevant to whether an award of third-party custody or visitation is in the child's best interest – K.M.M. v K.E.W., 539 S.W. 3d 722.

1.5 Relevance of Marriage at Point of Conception or Birth

Marriage, or an attempt to lawfully marry, within a 300-day time period of a child's birth implicates a presumption of paternity for the man – Missouri

Revised Statute § 210.822. The parent-and-child relationship is not dependent on marriage, as Missouri Revised Statute § 210.818 specifically provides that the parent-and-child relationship extends equally to every child and every parent, regardless of the marital status of the parents.

1.6 Same-Sex Relationships

The Missouri Court of Appeals held that Missouri law referring to the masculine gender includes females as well, and that Missouri law concerning the presumption of natural parentage equally applies to same-sex married couples – Schaberg v Schaberg, 637 S.W.3d 512.

1.7 Adoption

When a child is adopted and a final decree of adoption is approved by a court and filed, all legal relationships and all rights and duties are deemed and held to be for every purpose between the child and its parent or parents by adoption, as fully as though born during a lawful marriage – Missouri Revised Statute § 453.090.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

Written notice of a proposed relocation of a minor child by one of its parents must be given to any party with custody or visitation rights at least 60 days in advance of the proposed relocation.

2.2 Relocation Without Full Consent

A party seeking to relocate a minor child is required to give written notice by certified mail, with a return receipt requested, to any party with custody or visitation rights. A parent desiring to relocate a minor child is not required to file any motion seeking permission to move – Herigon v Herigon 121 S.W.3d 562 (Mo.App.W.D.2003). Once proper notice is given, the relocation will be permitted unless the non-relocating parent makes a timely objection to the relocation in court. If a timely objection is filed, the party desiring to relocate the child must prove that the proposed relocation is made in good faith and is in the best interests of the child.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

Missouri's relocation statute recognises two separate modes, or tracks, for permitting a parent to relocate with a child:

- a non-court-ordered relocation, where the non-relocating parent does not timely object to the relocation (effectively waiving their right to object); and
- a court-ordered relocation overruling the objection of the non-relocating parent.

Although not expressly identified as a factor in the relocation statute, the party wishing to relocate the minor child must have some legal basis, or right, to establish the residence of the child prior to proposing a relocation of the child. When deciding whether to grant a parent's contested request to relocate, the trial court is to be guided by all relevant considerations consistent with the best interests of the child, in deciding whether the relocation is requested in good faith and would be in the best interests of the child – Stowe v Spence, 41 S.W.3d 468 (Missouri banc 2001).

2.3.2 Wishes and Feelings of the Child

The trial court's required "best interests" analysis should include the wishes of the child if the child is of sufficient age to form and express a

preference. A trial court judgment was reversed for abuse of discretion by not considering the wishes of a child aged 13 in a custody modification trial following a non-consensual relocation that violated the relocation statute – Sanders v Busch, 123 S.W.3d 311 (Missouri Appeal Court 2003).

2.3.3 Age/Maturity of the Child

It is a long-standing rule that a court should permit a child of sufficient age to form and express an intelligent custodial preference and that the court must consider the child's preference along with the other facts and circumstances of the case – Babbitt v Babbitt, 15 S.W.3d 787 (Missouri Appeal Court 2000). The weight of a child's preference varies with the age of the child, and courts have been upheld for refusing to consider the preference of children aged eight or nine years.

2.3.4 Importance of Keeping Children Together

A trial court's analysis of the best interests of a child should include the interaction and interrelationship of the child with their parents, siblings, and any other person who may significantly affect the child's best interests – Missouri Revised Statute § 452.375.

2.3.5 Loss of Contact

In the "best interests" analysis required of trial courts deciding contested relocation cases, great weight is placed on the relationship between the child and the non-relocating parent. Among other things, according to Missouri Revised Statute § 452.375, the trial court must consider:

- the needs of the child for a frequent, continuing and meaningful relationship with both parents, and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;
- the interaction and interrelationship of the child with their parents, siblings, and any other person who may significantly affect the child's best interests; and
- which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

"Good faith" is not defined by Missouri statutes for child relocation purposes, but it has been held to reference the relocating parent's motivation or purpose for relocating. Missouri appellate courts have essentially defined it as the relocating parent's motive or purpose for relocating being something other than to disrupt or deprive the non-relocating parent of contact with the children – Swisher v Swisher, 124 S.W.3d 477 (Missouri Appeal Court 2003). Relocations for improved financial conditions and to be with a new spouse and keep the family together have been determined to be good faith reasons for relocation.

2.3.7 Grounds for Opposition to Relocation

Evidence that the relocating parent's motivation is to limit the non-relocating parent's contact with the child or children will likely lead to a determination that the proposed relocation is not made in good faith, and result in a denied relocation – Dixon v Dixon, 62 S.W.3d 589 (Missouri Appeal Court 2001).

2.3.8 Costs of an Application for Relocation

The relocation statute specifically provides that any party who objects in good faith to the relocation of a child's principal residence will not be ordered to pay the costs and attorney's fees of the party seeking to relocate. This statutory pro-

hibition has served as a bar to the recovery of attorney's fees for parties who have been successful in expensive and lengthy relocation litigation and appeals.

2.3.9 Time Taken by an Application for Relocation

The timeframe for a contested relocation matter varies so widely, based on the circumstances of the parties and the trial court, that it is impossible to provide an estimate of a timeframe. The duration of litigation is compounded if one or both parties decide to appeal a trial court's decision.

2.3.10 Primary Caregivers Versus Left-Behind Parents

The view of the trial court towards either parent depends on the circumstances leading to the litigation. If the parent proposing relocation has complied with the relocation statute, they will receive the benefit of a robust analysis by the trial court. If the objecting parent can show that the parent requesting relocation violated the statute or a court order, the relocation effort will be viewed with scepticism by the trial court, making the presentation at trial more challenging.

2.4 Relocation Within a Jurisdiction

Although most of the appellate decisions addressing child relocation involve moves to other jurisdictions, the language of the statute concerning changing the principal residence of the child is not necessarily limited to cross-border relocations. The relocation notice requirement may be implicated by in-state moves that would change the principal residence of a child.

3. Child Abduction

3.1 Legality

Parental kidnapping is a criminal offence classified as a felony. The statute provides that, in the absence of a court order determining rights of custody or visitation to a child, a person having a right of custody of the child is committing the offence of parental kidnapping if they remove, take, detain, conceal, or entice away that child within or without the state, without good cause, and with the intent to deprive the custody right of another person or a public agency also having a custody right to that child – Missouri Revised Statute § 565.153. Following a conviction for parental kidnapping, in addition to a fine or incarceration, the court may assess against the defendant any reasonable expenses incurred by the legal custodian or parent in searching for or returning the child.

When a relocation occurs in violation of Missouri's relocation statute, a separate statue provides that the relocation is a change of circumstances allowing the trial court to modify a prior custody or visitation order – Missouri Revised Statute § 452.411.

3.2 Steps Taken to Return Abducted Children

Missouri's enforcement provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) provide specific, special protection for persons seeking enforcement of a child custody determination or enforcement of an order for the return of a child under the Hague Convention on the Civil Aspects of International Child Abduction. The parental kidnapping statute provides for simultaneous criminal prosecution of an abducting parent in addition to the civil relief available under the UCCJEA and the Hague Convention.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

The United States of America is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. Missouri has adopted the UCCJEA, which provides for the enforcement and return of the child under the Hague Convention. The United States Department of State, Office of Children's Issues in the Bureau of Consular Affairs is the central authority that carries out the duties under the Hague Convention.

The United States Department of State issues annual reports, providing a breakdown of abduction cases by country. The 2024 report notes the percentage of cases that are resolved within one year of abduction, along with an explanation about the difficulties encountered with the central authority of some foreign states.

The Department of State is committed to aiding in and providing for the safe return of children abducted from their homes and helps lead the effort to meet the United States' obligations under the Hague Convention. With that aim in mind, when a parent informs the central authority that their child has been abducted or retained outside the United States, they quickly put that parent in touch with an attorney capable of commencing litigation for the return of the child.

A filed petition is required in order to commence a Hague proceeding. The petition must allege the following:

- the wrongful removal or retention of a child, in violation of a parent's custody rights that were actually exercised by that parent;
- the source of the custody rights;
- the date of the wrongful conduct; and
- the child's age.

Once a Hague petition is filed, the court is required to act expeditiously. If a decision has not been made within six weeks of filing, the central authority can request a statement asking for the reason for the delay. When deciding the case, a court is empowered to take judicial notice of the law and decisions in the state of the child's habitual residence.

Prior to ordering the return of a child, the court may request a determination of wrongfulness from authorities in the state of habitual residence. The Hague Convention also bars a court in the country where the child has been taken from considering the merits of custody claims once it has received notice of the removal or retention of the child.

Once a petition has been filed, the petitioner has the burden to prove, by a preponderance of evidence, the following:

- the child has either been wrongfully removed to this country or wrongfully retained in this country;
- the child was a habitual resident at the time they were removed;
- the removal was in breach of the petitioner's custody rights; and
- the petitioner had been exercising those rights at the time of retention.

The respondent may then present affirmative defences, in support of the minor child's relocation, including the following:

- grave risk (that the minor child would suffer grave risk if returned to the jurisdiction – this is typically used in developing or war-torn countries);
- the other parent has consented to, or acquiesced in, the relocation;

- the child is of an appropriate age and maturity, and objects to the return; and
- the petition was filed more than one year following the relocation and the child is well settled in the new jurisdiction.

3.4 Non-Hague Convention Countries

The United States of America is a signatory to the Hague Convention.

USA – NEW YORK

Law and Practice

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Teitler & Teitler, LLP is a 17-lawyer New York City litigation boutique with more than 50 years' experience of counselling clients in navigating complex high-stakes disputes and crisis management situations. With extensive trial experience, Teitler & Teitler LLP stands ready to try the most difficult and important cases in New York state and federal courts. The firm has advised and represented domestic and foreign individuals and entities in family law, trust and estates, and commercial matters. This includes settlement and trial of ultra-high net worth matrimonial actions involving complex financial, business valuation, and custody issues, as well as the negotiation of pre- and postnuptial agreements.

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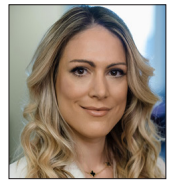

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

New York does not by statute affirmatively delineate parental rights and powers. Nonetheless, "it is the natural right, as well as the legal duty, of a parent to care for, control and protect his child from potential harm, whatever the source" (Roe v Doe, 272 N.E.2d 567, 570 (NY 1971)). "Parents have a fundamental right to raise their children in the manner they choose, subject to the state's ability to intervene to protect children in narrow circumstances" (Matter of Athena Y, 161 N.Y.S.3d 335, 337 (App Div 3d Dep't 2021)). See also Matter of Hofbauer, 393 N.E.2d 1009, 1013 (NY 1979) – "every parent has a fundamental right to rear its child" – and Troxell v Granville, 530 US 57, 65 (2000) – "the interest of parents in the care, custody, and control of their children... is perhaps the oldest of the fundamental liberty interests recogni[s]ed by this court".

Thus custodial parents may make decisions regarding – among other things – a child's education, religious upbringing and training, and healthcare. They also have the right to discipline the child and promote the child's welfare. In certain instances, parents are vicariously liable for destruction of property caused by children aged between ten and 18 years.

When parents fail to exercise their prerogatives, Section 1011 of the New York Family Court Act (FCA) permits the court to protect children from injury or mistreatment and safeguard their physical, mental and emotional well-being – even over the objections of a parent.

Parents are responsible for the financial support of a child until age 21 – see Section 413(1)(a) of the FCA ("the parents of a child under the age of twenty-one years are chargeable with the support of such child"). Section 240(1-b)(c)(2)-(3) of the NY Domestic Relations Law (DRL) and Section 413(1)(c)(2)-(3) of the FCA concern prorating obligation between parents. Additionally, Section 240(1-b)(c)(5) of the DRL and Section 413(1)(c)(5) of the FCA require parents to provide health insurance benefits.

1.2 Requirements for Birth Mothers

New York does not impose requirements on a birth mother beyond those delineated in **1.1**

Parental Responsibility. Both parents have the right to seek custody.

1.3 Requirements for Fathers

New York does not impose requirements on a father beyond those delineated in **1.1 Parental Responsibility**. Both parents have the right to seek custody.

1.4 Requirements for Non-genetic Parents

Where clear and convincing evidence demonstrates an agreement to conceive and raise a child together, the non-biological, non-adoptive partner has standing to seek custody – even when the parties to a familial relationship are not married to each other.

1.5 Relevance of Marriage at Point of Conception or Birth

See **1.1 Parental Responsibility**. Both parents have the right to seek custody, regardless of whether or not they were married to each other at the point of the conception or birth of the child. Note that a child born of parents who at any time before or after the birth of the child are married to each other is presumed to be the legitimate child of the marriage.

1.6 Same-Sex Relationships

As previously mentioned in the preceding sections, both parents have the right to seek custody. "Parents" is not exclusively defined as biological parents; parties to a familial relationship (even if not married), who agree to conceive and raise a child together, both have standing to seek custody (see **1.4 Requirements for Non-genetic Parents**).

"A proper test for standing ensures equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents" (Brooke SB v Elizabeth ACC, 61 N.E.3d, 498–99 (NY 2016)). See also Weichman v Weichman, 158 N.Y.S.3d 154, 156–57 (App Div 2d Dep't 2021), which vacated a portion of an interlocutory judgment that barred a lesbian parent from "tak[ing] the child to a place or expos[ing] the child to an activity that violates rules, practices, traditions and culture of the child's Orthodox Jewish Chasidic Faith". KG v CH, 79 N.Y.S.3d 166, 174 (App Div 1st Dep't 2018) found that Brooke SB v Elizabeth ACC's requirement that a plan to conceive and raise a child together "be in effect at the time a child is identified does not add any heightened barrier for same-sex families".

Similarly, adoption is available to individuals and cohabiting couples, both heterosexual and same sex – the procedures are no different. Section 110 of the DRL includes "any two unmarried adult intimate partners" on its list of persons permitted to adopt. The New York Governor's Approval Memo of 17 September 2010 contains a "delineated list of those who may adopt" that "includes same-sex couples". "By replacing references to 'husband and wife' [in prior statute] with the gender-neutral term 'married couple', this measure will help ensure that all married couples, regardless of their sexual orientation, have equal rights to adopt a child together" (Memo in Support, Chapter 509, 2010 NY Laws).

1.7 Adoption

An adoption must be in the child's best interests. Pursuant to Sections 112 and 115 of the DRL, a person who wants to become an adoptive parent must file a petition specifying – inter alia – the following:

- whether they are of full age;

- whether they are married or unmarried and, if married, whether they are living together as husband and wife;
- the religious faith of the petitioners;
- the religious faith of the adoptive child and that of the child's parents as accurately as can be ascertained;
- the manner in which the adoptive parents obtained the adoptive child;
- the period of time during which the adoptive child has resided with the adoptive parents;
- the occupation and approximate income of the petitioners; and
- whether the adoptive parent or parents has a history of child abuse and maltreatment.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

Both parents are guardians of their children – with equal powers, rights and duties – and there is no prima facie right to sole custody of children in either parent. Under Article 3 of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the "1980 Hague Convention"), to which the USA is a party, the removal or retention of a child is unlawful if:

- it is in breach of the rights of custody attributed to a person under the law of the state in which the child was habitually resident immediately before the removal or retention; and
- at the time of the removal or retention those rights were actually exercised or would have been so exercised but for the removal or retention.

Thus, as a practical matter, the other parent's consent is required to allow relocation.

2.2 Relocation Without Full Consent

Within the context of a matrimonial action, the issue of relocation can be resolved by trial pursuant to Section 240(1)(a) of the DRL. Outside a matrimonial action, the issue of relocation can be resolved by habeas corpus petition under Section 70 of the DRL or Section 651 of the FCA.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

Relocation requires evaluation of "all the relevant facts and circumstances... with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child... These factors include, but are certainly not limited to, each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and non-custodial parents, the impact of the move on the quantity and quality of the child's future contact with the non-custodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the non-custodial parent and child through suitable visitation arrangements" (Tropea v Tropea, 665 N.E.2d 145, 150-51 (NY 1996)). See the New York Trends and Developments chapter in this guide for further discussion.

2.3.2 Wishes and Feelings of the Child

The child's wishes and feelings are not controlling but are entitled to great weight where the child's age and maturity would make the child's input particularly meaningful. See the New York Trends and Developments chapter in this guide for further discussion.

2.3.3 Age/Maturity of the Child

Generally, the older the child, the greater the weight the child's wishes and feelings carry. Some recent examples include:

- Cortes v Bryant, 188 N.Y.S.3d 186, 188–89 (App Div 2d Dep't 2023) – the trial court properly exercised discretion in not conducting an in camera interview with the children aged five years and three years;
- Morgan v Eckles, 185 N.Y.S.3d 790, 793 (App Div 2d Dep't 2023) – the preferences of children aged 12 and 13 years were entitled to great weight;
- Daniel G v Marie H, 151 N.Y.S.3d 475, 477, 483 (App Div 3d Dep't 2021) – owing to their "advanced age", a 14-year-old child's wishes were entitled to great weight; and
- Anwar RR v Robin RR, 151 N.Y.S.3d 214, 215–16, 218 (App Div 3d Dep't 2021) – the wishes of children 13 and 15 years of age were entitled to great weight.

See the New York Trends and Developments chapter in this guide for further discussion.

2.3.4 Importance of Keeping Children Together

In general, siblings should be kept together. However, the rule is not absolute and may be overcome where the best interests of each child lie in residing apart.

2.3.5 Loss of Contact

Loss of contact with the left-behind parent is a factor. See the New York Trends and Developments chapter in this guide for further discussion.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

"The rights and needs of the children... must be accorded the greatest weight" (Tropea v Tropea, 665 N.E.2d 145, 150 (NY 1996)). See the New York Trends and Developments chapter in this guide for further discussion.

2.3.7 Grounds for Opposition to Relocation

Grounds for opposition to relocation include:

- the relocation not being economically necessary;
- the relocation not enhancing the children's lives socially and economically; and
- the negative impact on the parent opposing relocation.

See the New York Trends and Developments chapter in this guide for further discussion.

2.3.8 Costs of an Application for Relocation

The parties may be required to pay their own attorney's fees and, in some instances (where there is a financial disparity), those of the other party. Parties' prior settlement agreements may also contain fee-shifting provisions, which are generally enforced. One or both parties may be required to pay the fees of an attorney or guardian ad litem for the child, as well as the fees of ancillary professionals such as forensic mental health evaluators.

2.3.9 Time Taken by an Application for Relocation

The applicable statutes impose the following deadlines:

- to determine a motion for emergency relief – 20 days after the motion is submitted for decision (Civil Practice Law and Rules (CPLR) 2219(a));

- to determine any other motion – 60 days after the motion is submitted for decision, CPLR 2219(a);
- for a judge to render a decision after a trial – 60 days after the cause or matter is finally submitted for decision (CPLR 4213(c)); and
- for a referee to render a decision after a trial – 30 days after the cause or matter is finally submitted for decision (CPLR 4319).

However, because of heavy court calendars in certain parts of New York, these deadlines are often not met.

2.3.10 Primary Caregivers Versus Left-Behind Parents

The authorities do not favour either parent when determining the outcome of an application. Each application is decided on its own facts.

2.4 Relocation Within a Jurisdiction

The answers provided throughout **2.3 Application to a State Authority for Permission to Relocate a Child** do not change if the proposed move is not to a new country but, rather, within the USA.

3. Child Abduction

3.1 Legality

Although kidnapping is a felony, Section 135.30 of the Penal Law provides that it is an affirmative defence if:

- the defendant is a relative of the person abducted; and
- the defendant's sole purpose was to assume control of the person abducted.

A "relative" is defined in Section 135.00 of the Penal Law as "a parent, ancestor, brother, sister, uncle or aunt".

The defence "was designed to treat more leniently the tragic taking of a child by a relative, often a parent, because of a custody battle" (People v Brown, 702 N.Y.S.2d 739, 741 (App Div 4th Dep't 2000)). The defence is not available, and the defendant would therefore be guilty, if the defendant's conduct "is so obviously and unjustifiably dangerous or harmful to the child as to be inconsistent with the idea of lawful custody" (People v Leonard, 970 N.E.2d 856, 859 (NY 2012)). In People v Leonard, the defence was not available to the defendant father who – when confronted by police at the child's home – held a knife to the child's chest and throat and threatened to kill the child if the police came closer.

Under federal law, "whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than three years, or both" (Section 1204(a) of Title 18 of the US Code). Pursuant to Section 1204(c) of Title 18 of the US Code, it is an affirmative defence if the defendant:

- acted under a valid court order granting the defendant legal custody or visitation rights which were in effect at the time of the offence;
- was fleeing an incidence or pattern of domestic violence; or
- the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights, failed to return the child because of circumstances beyond the defendant's control, and the defendant noti-

fied or made reasonable attempts to notify the other parent or lawful custodian of the circumstances within 24 hours after the visitation period expired, and returned the child as soon as possible.

3.2 Steps Taken to Return Abducted Children

If the country to which the child has been removed is a party to the 1980 Hague Convention, or if the child is removed from another US state to New York State, a proceeding may be brought under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The UCCJEA is codified in New York at Sections 75 to 78-a of the DRL, which includes enforcement under the 1980 Hague Convention. The Hague Convention is codified in the USA at Sections 9001 to 9011 of Title 22 of the US Code. The UCCJEA is also available if the child has been removed to a country that is not a party to the 1980 Hague Convention.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

The USA is a signatory to the 1980 Hague Convention.

- The US Department of State administers the Hague Convention Attorney Network to assist low-income parents in treaty-partner countries in finding attorneys to bring 1980 Hague Convention cases in US courts.
- Annual reports on international child abduction prepared by the US Department of State are available on its website.
- Whether return is immediate or defences are accepted depends on the particular case.
- The UCCJEA may be used to seek the return of an abducted child to a non-signatory country. Further legal information for parents can be found on the US Department of State website.
- The timescale for 1980 Hague Convention applications is set forth in the country-by-country breakdowns provided in the above-mentioned annual reports. The expenses will vary from case to case.

3.4 Non-Hague Convention Countries

This section is not applicable to the USA, which is a signatory to the 1980 Hague Convention.

Trends and Developments

Contributed by:
Nicholas W Lobenthal, Jaime L Weiss and Elizabeth White Bass
Teitler & Teitler, LLP

Teitler & Teitler, LLP is a 17-lawyer New York City litigation boutique with more than 50 years' experience of counselling clients in navigating complex high-stakes disputes and crisis management situations. With extensive trial experience, Teitler & Teitler LLP stands ready to try the most difficult and important cases in New York state and federal courts. The firm has advised and represented domestic and foreign individuals and entities in family law, trust and estates, and commercial matters. This includes settlement and trial of ultra-high net worth matrimonial actions involving complex financial, business valuation, and custody issues, as well as the negotiation of pre- and postnuptial agreements.

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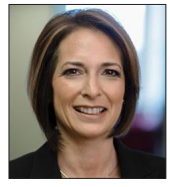
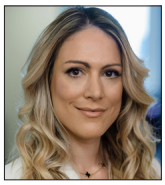


Jaime L Weiss has focused her practice exclusively on family law for more than 20 years. Prior to joining Teitler & Teitler, LLP, she was a commercial litigator at the predecessor of Troutman Sanders LLP, and before that, she focused full time on family law at the predecessor of Hogan Lovells. Jaime negotiates marital agreements and advises on international family law matters, in addition to litigating family law matters at the trial and appellate level. She has been an adjunct professor of family law at Benjamin N Cardozo School of Law and is a member of the New York State Bar Association Family Law Section.



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Recent New York State Relocation Cases

New York State courts will implement shared custody and access when it is both feasible (ie, the parties are capable of co-parenting with one another) and in a child's best interest. Especially in the context of shared parenting arrangements, relocation "present[s] some of the knottiest and most disturbing problems that our courts are called upon to resolve" pitting the desire to move against the remaining parent's "powerful desire to maintain frequent and regular contact with the child. Moreover, the court must weigh the paramount interests of the child, which may or may not be in irreconcilable conflict with those of one or both of the parents" – Tropea v Tropea, 665 N.E.2d 145, 148 (N.Y. 1996). Advances in travel, remote work and communication technology have not in the slightest ameliorated these difficulties.

The burden is on the parent seeking to relocate with the child to demonstrate by a preponderance of the evidence either a "substantial change in circumstances" (if there has already been a custody determination) or that relocation is in the child's best interests taking into account all of the relevant factors (if this is a de novo custody determination). The basic inquiry is whether the benefits of relocation outweigh the negative impact on the child's relationship with the non-relocating parent, taking into account ameliorative steps such as altered but substantively equivalent time-sharing arrangements. The court will inquire into the quality of the parent-child relationships, the impact of the move on the quantity and quality of contact with the non-relocating parent, the degree to which the relocating parent's and child's lives may be enhanced economically, emotionally and educationally, and the feasibility and suitability of alternative access arrangements. The court will also attempt to ascertain the "real" motive of each parent for proposing/opposing relocation (in some cases, it is a permissible motivation to remarry or make a "fresh start") considering among other things the credibility, character, temperament and sincerity of the parties. The court will also determine whether or not (and to what degree) the non-relocating parent is actually involved in the child's life and makes full use of available parenting time. Finally, the court will be very interested in whether the relocating parent will in fact foster the child's relationship with the non-relocating parent, or take unfair advantage of distance to engage in "negative gatekeeping".

Appeal courts tend to defer to the trial courts on these issues and not disturb relocation decisions having a "sound and substantial" basis in the record.

Relocation determinations should generally be made only after a full hearing and inquiry into the facts and circumstances of the case, to protect the best interests of the children. See Janvier v Santana-Jackson, 199 N.Y.S.3d 665 (App. Div. 2d Dep't 2023) remitting a relocation petition for hearing where the trial court had improperly issued an interim order while the trial was ongoing.

Child's bond with each parent

The non-relocating parent's continuing meaningful involvement in the child's life may be achieved through methods such as a parenting schedule providing longer periods during school vacations and/or sharing the labour and financial burden of bringing the child and non-relocating parent together during the school term and/or through technology platforms such as FaceTime – all taking into consideration the age, needs and maturity of the child.

Representative recent cases include:

- Relocation granted where the non-relocating parent could maintain a meaningful relationship with the child by spending six weeks during the summer and other school breaks with the child – Faea OO. v Isaiah PP., 198 N.Y.S.3d 437 (App. Div. 3d Dep't 2023).
- Relocation denied where it would negatively impact the child's relationship with the remaining parent, who had been actively involved in the child's life since birth and was a 50/50 parent in all respects, where the relocating parent's proposed revised parenting schedule eliminated the majority of the non-relocating parent's overnight visits, reducing parental time to three weekends a month, and barred involvement in school-related and afterschool activities – T.D. v L.M.D., 191 N.Y.S.3d 42, 43 (App. Div. 1st Dep't 2023).
- Relocation permitted where the relocating parent was the child's primary caretaker, the child suffered when left alone under the other parent's care and the "left-behind" parent was awarded liberal access time including during summer and other school vacations – Nancy A. v Juan A.B., 180 N.Y.S.3d 908 (App. Div. 1st Dep't 2023).
- Relocation permitted where the relocating parent was the child's primary caregiver and the "left-behind" parent could keep in contact by telephone and video and have extended access during school breaks – Thomas v Mobley, 170 N.Y.S.3d 172, 176 (App. Div. 2d Dep't 2022).

Stability versus potential enhancements to the status quo

Custodial stability, even with a "less than perfect" parent, is generally a plus. Thus, a proposed relocation should have a quality of permanency such that the child will not prematurely be asked to set down roots elsewhere frequently. Courts will inquire about a child's ties to the current jurisdiction – through school, friends, doctors, care-providers, extra-curricular activities, family members (including other siblings) and other cultural and/or social connections – and how, if at all, such ties can be preserved and/or replicated.

The relocating parent must concretely show how the child will be integrated into the new community (school, activities, childcare and social engagement) and how the child will benefit (economically, emotionally and/or educationally). For example, relocation may:

- enable the relocating parent to obtain otherwise unavailable or enhanced employment or business opportunities;
- enable the child to be closer to extended family providing emotional, caretaking and/or financial support; and
- enhance education and/or medical treatment which may be particularly important where a child has special needs.

Sometimes emotional and financial enhancement go hand-in-hand as, for example, when family and friends are available to provide childcare or where the relocating parent has more flexible work hours permitting more time to be spent with the child.

In what is a bit of a Catch-22 situation, however, until and unless leave to relocate is granted, the parent wishing to relocate may be unable to make these specific enhancements concrete (ie, applying to a specific school; consulting with a specific doctor). Similarly, one court rejected relocation premised in part on the relocating parent's family's willingness also to relocate to the same jurisdiction as being based on a wished-

for resource, as opposed to a resource already present.

Representative recent cases include:

- Relocation permitted where the children's lives would be enhanced economically and emotionally – Henry CC. v Antoinette DD., 202 N.Y.S.3d 526 (App. Div. 3d Dep't 2023).
- Relocation with nine-year-old denied. Child had strong connections and ties to New York including friends, school, activities, doctors and care providers – W.H. v L.H., 187 N.Y.S.3d 584 (N.Y. Sup. Ct. N.Y. Cnty. 2023).
- Relocation permitted to enhance child's life economically and emotionally. Relocating parent had a strong support system of extended family in new location, where housing and childcare would be provided for free, allowing the relocating parent to work more hours and earn more income, and the child to enjoy a close relationship with family members – S.R. v. S.W., 180 N.Y.S.3d 800 (N.Y. Fam. Ct. Tomkins Cnty. 2022).

The child's wishes

A child's wishes or preferences may be considered by the court and given greater or lesser weight depending on age, maturity and other facts and circumstances. Wishes or preferences can be communicated through counsel for the child, through a forensic evaluator, or even by the court directly interviewing the child in chambers outside of the presence of the parties, with counsel of the child present. Children may sometimes express a desire to live with one parent, or to continue to attend (or to change) school. At the same time, and paradoxically, the relocating parent can be criticised for, or even barred from, informing the child (especially a young one) about even the possibility of relocation such that the child may not have a meaningful opportunity to express a preference for or against changing the status quo. To the extent the child does express a preference, the court is more likely to consider the wishes of a child of "advanced age" which, although not specifically defined, appears to encompass teenagers. Of course, children may change their mind over time, and preferences that may have been expressed in a former custody proceeding, if no longer current, will not be given much weight. However, children expressing their wishes is not the same as children deciding.

Representative recent cases include:

- Relocation denied where the trial court improperly allowed the children's wishes to chart the course of litigation – Mason v Mason, 193 N.Y.S.3d 803 (App. Div. 4th Dep't 2023).
- Relocation permitted even though the court-appointed forensic evaluator found that the child's best interests were not served by the relocation, where the court-appointed forensic evaluator based this conclusion on conversations with the child that occurred over one year before the trial. The child's wishes had changed at the time of the trial, and the attorney for the child recommended relocation – Alevy v Herz, 186 N.Y.S.3d 29 (App. Div. 1st Dep't 2023).
- Relocation denied despite potential to enhance child's life financially, where the child had a strong bond with the remaining parent and was of an advanced age and expressed the desire to remain with this parent and attend the local high school – Daniel G. v Marie H., 151 N.Y.S.3d 475 (App. Div. 3d Dep't 2021).
- Relocation permitted, taking into consideration the fact that the teenage child expressed a preference for relocation – Louis B. v Jen-

nifer L., 131 N.Y.S.3d 335, 336 (App. Div. 1st Dep't 2020).

Distance

Geographical distance is not per se determinative. Even a small distance can unreasonably impede parental access where it would burden weekend access, if not render it impossible. Representative recent cases include:

- Relocation permitted where the child was academically and socially thriving in his new school in the new location and a liberal parental access schedule would allow for the continuation of a meaningful relationship between the non-relocating parent and the child – Wright v Burke, 209 N.Y.S.3d 67 (App. Div. 2d Dep't 2024).
- Relocation permitted despite requiring non-relocating parent to travel an additional 15 minutes by car, where the move would not have a substantial impact on the non-relocating parent's access and the child's life would be enhanced economically by the move – Thomas S.S. v Alicia T.T., 170 N.Y.S.3d 389 (App. Div. 3d Dep't 2022).
- Relocation 12.5 miles away denied where it would negatively impact the quantity and quality of the contact with the other parent whose religious practices prevented car travel on weekends and certain holidays, and thus would bar access according to the parenting time schedule in place and significantly hamper attendance at activities – Schwartz v Schwartz, 132 N.Y.S.3d 34, 37 (App. Div. 2d Dep't 2020).

Parties' prior agreements

Where the pre-existing custodial relationship results from the prior agreement of the parties and has successfully been implemented over time, such prior agreement will be given significant deference as a recognition of the child's best interests. Agreements containing a "radius clause" permitting and/or restricting relocation are particularly relevant.

Incidentally, during the COVID-19 pandemic, some parents made informal or temporary changes to pre-existing formal parenting arrangements and later argued that the pandemic situation warranted more permanent relocations. The courts have consistently enforced parties' formal custodial arrangements as the pandemic has ebbed. During the COVID-19 pandemic, courts were mindful of not allowing parents to shoehorn temporary pandemic arrangements into more permanent ones.

Representative recent cases include:

- Denying relocation where the parties' informal agreement to reside in their second homes during the COVID-19 pandemic did not alter the five-mile radius clause of their existing custody agreement – Cleary-Thomas v Thomas, 155 N.Y.S.3d 316 (App. Div. 1st Dep't 2021).
- In denying relocation, the court heavily weighted a non-relocation "radius clause" in a custody agreement, despite the fact that the parties temporarily navigated exchanges over distances exceeding the radius during the COVID-19 pandemic – W.H. v L.H., 187 N.Y.S.3d 584 (N.Y. Sup. Ct. N.Y. Cnty. 2023).

Domestic violence and related issues

Proven domestic violence and/or abuse/neglect impact relocation. Representative recent cases include:

- Permitting relocation based in part on a history of domestic violence by the objecting parent including instances of verbal and

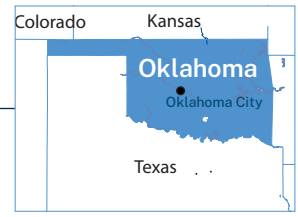
physical abuse in front of the children – Henry CC. v Antoinette DD., 202 N.Y.S.3d 526 (App. Div. 3d Dep't 2023).

- Permitting a child's relocation to Texas with its father based on credible evidence that the mother, although initially awarded sole legal and physical custody, neglected the child including with respect to the child's hygiene and school attendance, and where there were concerns about the mother's substance misuse – Jesse FF. v Amber GG., 202 N.Y.S.3d 505 (App. Div 3d Dep't 2023).
- Permitting relocation even though it would disrupt the remaining parent's regular access given credible evidence that the remaining parent engaged in verbal and substance abuse and subjected the relocating parent to domestic violence – Lavery v O'Sullivan, 169 N.Y.S.3d 632 (App. Div. 2d Dep't 2022).

Conclusion

Relocation proceedings, as with all custody-related proceedings in New York State, ultimately turn on the particular facts and circumstances and the best interests of the child. While on its face relocation appears to conflict with shared parenting, courts must determine how, if at all, parenting can be (re)structured to preserve the non-relocating parent's involvement if relocation is otherwise best for the child overall.

USA – OKLAHOMA



Law and Practice

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Bundy Law is a regional law firm headquartered in Tulsa, Oklahoma. Its trial attorneys advise clients across Oklahoma, Arkansas, and Missouri on high-net-worth financial disputes, including the valuation and division of professional practices, mineral interests, farms, ranches, artwork, and investment portfolios. Bundy Law employs next-generation technology, with intake, discovery, trial preparation, and briefing processes enhanced by artificial intelligence. Ranked Band 1 in the Chambers Family/Matrimonial High Net Worth Guide, Bundy Law is well suited for high-value, high-stakes, and fast-paced financial cases and appellate matters involving novel issues.

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

Oklahoma's appellate courts have fully endorsed the United States Supreme Court's decision in Troxel v Granville, 530 U.S. 57 (2000), which affirmed the fundamental, historical right of parents to rear their children. Oklahoma's statutes include a Parents' Bill of Rights, which confirms the inalienable rights of parents to and concerning their minor children.

Unless parental rights have been terminated, a parent–child relationship established under applicable Oklahoma law applies for all purposes (Oklahoma Statute Title 10, Section 7700-203). "The right of a parent to the care, custody, companionship and management of his or her child is a fundamental right protected by the federal and state constitutions." (In re Adoption of D.T.H., 615 P.2d 287, 1980 OK 119, ¶18 (Oklahoma 1980).) The Oklahoma Supreme Court recently held that a parent's fundamental liberty interests are subservient to a child's best interests. (In the Matter of the Adoption of L.B.L., 2023 OK 48, ¶12.)

1.2 Requirements for Birth Mothers

It is a matter of long-standing Oklahoma precedent that the establishment of a mother–child relationship automatically confers parental rights to any woman who gives birth to a child or legally adopts a child (Oklahoma Statute Title 10, Section 7700-201). The birth itself confers parental rights onto any biological mother. Another statute, Oklahoma Statute Title 10, Section 7800, provides that an unwed mother has custody of her child until a court determines otherwise. A recent legislative change in another statutory title confers equal rights and status upon the father of a child born out of wedlock if the father signs an acknowledgment of paternity (Oklahoma Statute Title 63, Section 1-311). This new statutory provision conflicts with the longstanding interpretation of the statute vesting custody of a child with an unwed mother and is the subject of much debate among family law practitioners and the judiciary.

1.3 Requirements for Fathers

Fathers who are parents to children born out of wedlock have a status that is different from mothers who are similarly situated. Until recently, Oklahoma law did not automatically confer parental rights on a child's biological father unless the parents were married at the time of the child's birth. In 2022, the legislature modified a statute so that fathers who sign an "acknowledgement of paternity" have rights and obligations equal to mothers. This new law treats a child whose parentage has been established the same as children of parents who were married at the time of birth.

Hospitals are legally required to provide an acknowledgment of paternity form to parents of any child born to unmarried individuals. The acknowledgment of paternity form may also be obtained from the Oklahoma State Department of Health, Division of Vital Records, or the Oklahoma Department of Human Services Child Support offices (Oklahoma Statute Title 63, Section 1-311 (D)(2)).

1.4 Requirements for Non-genetic Parents

Advances in medical technology have allowed couples who otherwise would have been unable to naturally conceive to have children of their own. These situations have created the need for legislation when one or both individuals are not the child's biological parent. Artificial insemina-

tion, oocyte donation and human embryo transfers are just some of these situations.

In Oklahoma, children who are conceived through artificial insemination, oocyte donation or human embryo transfer are considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife so requesting and consenting to the use of such technique (Oklahoma Statute Title 10, Sections 552, 554 and 556).

1.5 Relevance of Marriage at Point of Conception or Birth

When a child is born to a woman who is married, her husband is presumed to be the biological father of the child. Additionally, a man is presumed the father of a child if he resided with the minor child for the first two years of the child's life and openly held himself out as the child's father. In both of these situations, however, the legal presumption of paternity may be rebutted in certain circumstances by either the presumed father, the mother, or another individual within the appropriate time period and confines contained in the Uniform Parentage Act (Oklahoma Statute Title 10, Section 7700-204). Married parents of minor children have equal rights and responsibilities to their children under Oklahoma law.

1.6 Same-Sex Relationships

Same-sex marriage became legal in Oklahoma in 2014 following the Tenth Circuit Court of Appeals' decision in Bishop v Smith, 760 F.3d 1070. That appellate decision paved the way for equal rights in Oklahoma, including the ability for same-sex couples to adopt. With respect to adoption, the requirements for the adoption of a minor child are identical for same-sex couples as they are for heterosexual couples in Oklahoma. Both sets of individuals must petition the court and meet certain basic residency and best-interest considerations to be permitted to adopt.

The situation is somewhat different when one of the individuals in a same-sex relationship is the biological parent of a child born during the marriage and the other is not. A recent case out of Oklahoma County demonstrates the differences in parentage presumptions in same-sex and heterosexual relationships. In a pending case entitled Wilson v Williams, one partner to a lesbian relationship gave birth during the marriage to her biological child, who had been conceived by artificial insemination. While both women were listed as mothers on the child's birth certificate, questions regarding parentage arose during their divorce proceeding. Had the couple been heterosexual, the artificial insemination statute would have clearly established parentage in both individuals. However, the statute did not apply because the statute specifically uses the words "husband" and "wife". Instead, the trial court found that the non-biological mother should have filed for adoption during the marriage to confer parental rights. Given that she did not, and instead waited until the divorce proceeding to attempt to establish rights, the judge ruled that she forfeited her parental rights to the child's sperm donor. While this case is currently before the Oklahoma Supreme Court on appeal, it highlights many of the issues surrounding parentage in same-sex marriage and child custody disputes.

1.7 Adoption

Any person wishing to adopt a child in Oklahoma must first give the minor child's natural parents notice of the adoption proceeding. This can be difficult when either parent's whereabouts are unknown.

After providing notice of the adoption proceeding, the party wishing to adopt must either obtain the consent of both natural parents or must prove to the court that the consent of one or both of the natural parents is not required. There are several situations that would support a trial court's decision that the consent of a natural parent is not necessary for the adoption to proceed. Those include proof that a parent has not provided support for the child for a period of twelve consecutive months, has not maintained a positive and substantial relationship with the minor child for a period of twelve consecutive months, has been incarcerated for a period of ten years or more, or has been convicted of certain crimes involving children, among others.

After the petitioning party has obtained consent or had the court determine that consent is not required, they must undergo multiple background checks, go through a home study, and must prove to the court, through testimony, that the adoption is in the minor child's best interests.

Once all of the above requirements are met, the petitioner may ask for the adoption to be set for a final hearing, at which time they will accept all rights and responsibilities for the minor child.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

The mother of a child born out of wedlock is the custodial parent as a matter of law unless there is a valid acknowledgement of paternity, a court order, or pending legal action. In the absence of a determination of paternity, an unwed mother may relocate with her child without notice to the biological father whose custody and visitation rights have not been established. In those circumstances, there is a six-month window under the Uniform Child Custody Jurisdiction and Enforcement Act wherein the father of a child born out of wedlock may bring an action to determine parentage.

Any parent who has the right to establish a residence for the minor child, meaning the custodial parent or the primary parent in a joint custody paradigm, must notify the other parent entitled to visitation with the minor child of their intent to relocate from the child's current principal residence. Relocation is defined as a change in the minor child's primary residence over 75 miles from the child's current principal residence for a period of 60 days or more.

The relocation notification must be sent to the other parent by mail at that parent's last known address and no later than the 60th day before the intended move or the tenth day after the relocating parent learns the details of the relocation. The relocation notification must contain the following information:

- the intended new residence, including the specific address, if known;
- mailing address, if not the same;
- home telephone number, if known;
- date of the intended move or proposed relocation;
- brief statement of the specific reasons for the proposed relocation of the child, if applicable;
- proposal for a revised schedule of visitation with the child, if any; and
- a warning to the non-relocating parent that any objection to the relocation must be made within 30 days or the relocation will be permitted.

The non-relocating party then has 30 days within which to file an objection to the relocation with

the court. If the non-relocating party fails to file an objection within the timeframe, the requesting party may relocate with the children.

2.2 Relocation Without Full Consent

Once the non-relocating party files a timely objection to the notice of relocation with the court, the issue of relocation can only be resolved by agreement of the parties or by court order. If requested, the court is permitted to decide whether the requesting party is permitted to temporarily relocate with the minor children while the final issue is being litigated.

At the hearing, the requesting party has the burden of showing that the proposed relocation is being made in good faith. Good faith has been defined by the Court as "an honest intention to abstain from taking any unconscientious advantage of another" (Boatman v Boatman, 404 P.3d 822, 2017 OK 27 (Oklahoma 2017)). The Court has repeatedly found that "employment opportunities" and "financial considerations" are legitimate reasons to seek relocation and satisfy the good faith requirement.

If a showing of good faith is made, the burden of proof shifts to the party opposing relocation to prove that it is not in the best interests of the child. If the requesting party is unsuccessful in showing that the proposed relocation is made in good faith, then the burden stays with that party to show that the relocation is in the child's best interests.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

There are many factors that a court is required to consider when deciding whether to allow one party to relocate with the minor children. These factors include:

- the nature, quality, extent of involvement and duration of the child's relationship with both parents, siblings and other significant persons in the child's life;
- the age, developmental stage, needs of the child and the likely impact the relocation will have on the child's physical, educational and emotional development, taking into consideration any special needs of the child;
- the feasibility of preserving the relationship between the non-relocating person and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties;
- the child's preference, taking into consideration the age and maturity of the child;
- whether there is an established pattern of conduct of the person seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating party;
- whether the relocation of the child will enhance the general quality of life of both the custodial party seeking relocation and the child, including but not limited to financial or emotional benefit or education opportunity;
- the reasons of each person for seeking or opposing the relocation; and
- any other factor affecting the best interests of the child.

In addition, a court may consider a failure to provide proper notice to the non-relocating party as a factor in making its determination regarding the relocation of a child. The court is expressly prohibited from considering whether the parent seeking relocation has declared whether they will relocate if the child relocation request is denied.

The Oklahoma Supreme Court has cautioned that no single factor should be given more weight than the others and that trial courts should carefully consider the evidence relevant to each factor and determine whether that factor weighs in favour of or against relocation (Arulkumar v Arulkumar, 521 P.3d 131, 135, 2022 OK 90, ¶8 (Oklahoma 2022)).

2.3.2 Wishes and Feelings of the Child

One of the factors a court must consider when deciding whether to permit relocation is the child's preference, taking into consideration the age and maturity of the child. It is important to remember that just because a child may express a preference concerning relocation does not mean that the court is bound by that preference. The court must consider the other factors listed above.

2.3.3 Age/Maturity of the Child

The relocation statute specifically requires a trial court to consider the child's preference, taking into consideration the child's age and maturity. There is a rebuttable presumption that a child who is 12 years of age or older is of a sufficient age to form an intelligent opinion regarding their preference regarding custody and visitation (Oklahoma Statute Title 43, Section 113). In deciding whether the child is of sufficient age and maturity to state a preference, the court should first decide whether the child's best interests will be served by allowing the child to express a preference. The court may elect to permit the child to provide testimony regarding their preference or may conduct an in camera interview with the minor child, outside the presence of their parents or the attorneys.

2.3.4 Importance of Keeping Children Together

The nature, quality, extent of involvement and duration of the child's relationship with both parents, siblings and other significant persons in the child's life is one factor the trial court is required to consider when deciding whether to permit relocation. As noted in the Arulkumar case, relocation necessarily creates distance and changes in family relationships. While considering the minor child's relationship with siblings is one factor, it cannot be dispositive of the issue. "The natural interrelationship of the statutory factors require that they be read in harmony, and not in isolation." The Oklahoma Supreme Court stated in Arulkumar, "[w]e will not impose an unreasonable burden on trial courts to consider each of the statutory factors in isolation, as most factors and the facts that are applied are naturally intertwined."

2.3.5 Loss of Contact

For the non-relocating party, their first and primary concern is often the interruption of their visitation with the minor child. While the idea of a loss of contact and close proximity is understandably upsetting, it cannot be the sole factor in deciding the issue of relocation.

In Scocos v Scocos, 369 P.3d 1068, 2016 OK 35 (Oklahoma 2016), the father objected to the mother's proposed relocation. At trial, the father failed to present any evidence that the proposed relocation would not be in the children's best interests. Instead, his only concern was the disruption to his visitation schedule. In finding that the father had failed to meet his burden to show that the relocation was not in the children's best interest, the Oklahoma Supreme Court noted that "visitation rights alone are an insufficient basis on which to deny relocation". The Court cited its own precedent, Kaiser v Kaiser, 23

P.3d 278, 286 (Oklahoma 2001), to confirm that a "custodial parent's relocation should not be disallowed solely to 'maintain the existing visitation patterns'".

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

Each parent's status prior to a notice of relocation is important to a court's analysis. A parent with legal custody or one who had significantly more parenting time with a minor child is generally better positioned to make a case in favour of relocating the child than a parent who is in a joint custody, or shared parenting, scheme with the non-relocating parent.

The parent seeking to relocate has to show the court three things:

- the relocating parent qualifies, legally, as a parent entitled to establish the residence of the minor child;
- the relocating parent gave written notice to the other parent in compliance with the relocation statute; and
- the relocating parent's proposed relocation is made in good faith.

The definition of what is "good faith" is quite low. On multiple occasions, appellate courts have confirmed that "employment opportunities, financial considerations, and proximity to loved ones are all legitimate reasons to support relocation".

2.3.7 Grounds for Opposition to Relocation

While courts are required to consider all of the statutory factors, it seems as if courts tend to place more weight on the preservation of the relationship between the non-relocating person and the child and the emotional toll that the distance and disruption of visitation will take on the minor child. For example, in the Arulkumar case, the Oklahoma Supreme Court denied the mother's request to relocate with the minor child, noting that the distance created by the proposed relocation would "almost certainly deprive the child of his close bond with Father and Father's family, which would negatively impact his emotional development".

2.3.8 Costs of an Application for Relocation

As with other family law cases, it is difficult to accurately predict the cost of a relocation proceeding, as many of the factors that determine overall costs are out of either side's control. The non-relocating party may object, resulting in litigation, yet settle the case following the exchange and expense of discovery, or upon learning that the relocation may not substantially impact the non-relocating parent's time with the child. Other times, the parents are able to reach an agreement following the temporary order hearing, as the decision made by the trial court may be predictive of the final outcome of the case. In other cases, the parties endure a temporary order hearing, a final relocation trial and an appeal. Expenses mount as litigation continues through its various stages.

2.3.9 Time Taken by an Application for Relocation

Other than requiring the non-relocating party to file an objection to relocation within 30 days, the Oklahoma relocation statute does not establish a specific time period within which an objection to relocation or a request to relocate should be heard. With that said, trial courts are generally cognisant of the time-sensitive nature of relocation requests and will schedule a temporary order hearing prior to the proposed relocation, with sufficient notice to the non-relocating parent.

2.3.10 Primary Caregivers Versus Left-Behind Parents

The statutory factors imposed upon trial courts require judges to be equally sympathetic to the relocating and the non-relocating parent. In the initial phase, the court must consider whether the relocating parent is seeking to move in good faith. This involves scrutiny of the motives and intent behind the relocating parent, including financial, employment and relationship dynamics.

Next, a best interests analysis obligates the court to consider factors that may weigh in favour of the non-relocating party. For example, the court must analyse the impact that the relocation will have on the child's relationship with the non-relocating parent and that parent's extended family. The court must also make a determination as to the feasibility of preserving the minor child's relationship with the non-relocating party.

As written, the relocation statute provides trial courts with the framework they need to take each parent's concerns and requests into consideration.

2.4 Relocation Within a Jurisdiction

The relocation procedure is required for a parent seeking to move beyond 75 miles from the child's current primary residence, regardless of whether the move is within or beyond Oklahoma's borders. The relocation statute does not apply to a parent seeking to relocate a minor child to a new residence less than 75 miles from the child's current residence.

3. Child Abduction

3.1 Legality

In Oklahoma, it is illegal for a person to fraudulently or forcibly take or entice away a child under the age of 16 years, with the intent to detain or conceal the child from its parent, guardian or other person having legal rights to that child, or to transfer the child from the jurisdiction of Oklahoma or the United States of America. Any person engaging in said behaviour will be charged with a felony charge, punishable by up to ten years in prison (Oklahoma Statute Title 21, Section 891).

The law also provides a remedy should any person other than a parent remove a child from the jurisdiction, including grandparents and other family members. If the person removes the child with the intent of denying or interfering with a parent's right to custody or visitation under an existing order, that person shall be liable in an action at law. Potential remedies include the following:

- damages for loss of service, society and companionship;
- compensatory damages for reasonable expenses incurred in searching for the missing child or attending court hearings; and
- the prevailing party in such action shall be awarded reasonable attorney fees (Oklahoma Statute Title 43, Section 111.2).

When a dissolution of marriage action is pending, the automatic temporary injunction prohibits either parent from hiding their children from the other parent, and it forbids removing the children from the State of Oklahoma, except for vacations of two weeks' or less duration, unless the other parent consents to the travel.

3.2 Steps Taken to Return Abducted Children

If the minor child has been abducted to another state within the US, the first step would be to contact local authorities so that they can start an investigation into the whereabouts of the children. It is essential that the location of the children be determined so that any later obtained court orders can be properly served and enforced by local law enforcement. While the location of the children is being ascertained, legal paperwork, including a writ of habeas corpus and/or a writ of assistance, can be filed.

The situation changes when one parent removes the child to another country. In that situation, the parent can either start a case in the court in the country where the child has been taken, or in the court in the country of the child's habitual residence, or both. It is important to commence the proceeding within one year of the abduction, as it can be more difficult to get a court to return the child after they have become well settled in the new jurisdiction.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

The United States of America is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. Oklahoma has adopted the Uniform Child Custody Jurisdiction and Enforcement Act, which provides for the enforcement and return of the child under the Hague Convention. The United States Department of State, Office of Children's Issues in the Bureau of Consular Affairs is the Central Authority to carry out the duties under the Hague Convention.

The United States Department of State issues annual reports, providing a breakdown of abduction cases by country. The report on International Child Abduction notes the percentage of cases that are resolved within one year of abduction, along with an explanation about the difficulties encountered with the foreign state's Central Authority.

The Department of State is committed to aiding in and providing for the safe return of children abducted from their homes and helps lead the effort to meet the United States' obligations under the Hague Convention. With that aim in mind, when a parent informs the Central Authority that their child has been abducted or retained outside the United States, they quickly put that parent in touch with an attorney capable of commencing litigation for the return of the child.

A filed petition is required in order to commence a Hague proceeding. The petition must allege the following:

- the wrongful removal or retention of a child;
- in violation of a parent's custody rights;
- that were actually exercised by that parent;
- the source of the custody rights;
- the date of the wrongful conduct; and
- the child's age.

Once a Hague petition is filed, the court is required to act expeditiously. If a decision has not been made within six weeks of filing, the Central Authority can request a statement asking for the reason for the delay. When deciding the case, a court is empowered to take judicial notice of the law and decisions in the state of the child's habitual residence.

Prior to ordering the return of a child, the court may request a determination of wrongfulness from authorities in the state of habitual residence. The Hague Convention also bars a court in the country where the child has been taken

from considering the merits of custody claims once it has received notice of the removal or retention of the child.

Once a petition has been filed, the petitioner has the burden to prove, by a preponderance of the evidence, the following:

- the child has either been wrongfully removed to this country or wrongfully retained in this country;
- the child was a habitual resident at the time they were removed;
- the removal was in breach of the petitioner's custody rights; and
- the petitioner had been exercising those rights at the time of retention.

The respondent may then present affirmative defences, in support of the minor children's relocation, including the following:

- grave risk (that the minor child would suffer grave risk if returned to the jurisdiction – this is typically used in developing or war-torn countries);
- the other parent has consented to, or acquiesced in, the relocation;
- the child is of an appropriate age and maturity and objects to the return; and
- the petition was filed more than one year following the relocation and the child is well settled in the new jurisdiction.

3.4 Non-Hague Convention Countries

The United States of America is a signatory to the Hague Convention.

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