

## **International Child Abduction**

The *Family Law (Child Abduction Convention) Regulations 1986* ("the regulations") govern the procedures and the application of the substantive law for applications for a child to be returned to a reciprocating jurisdiction.

The regulations are made to implement the terms of the *Convention on the civil aspects of international child abduction 1980* ("the convention"). There are many countries, including Australia, that are signatories to the convention and the full list can be found on the Hague website.

### **So who can apply?**

The regulations provide that the applicant can be either;

- (a) a central authority; or
- (b) a natural person.

### **What types of orders can be made?**

The regulations set out the types of orders that a Court can make. Some examples of the orders that can be made are;

- a return order for the child;
- an order for the delivery of the passport of the child, and the passport of any other relevant person, to the responsible Central Authority, a member of the Australian Federal Police or a person specified in the order; or
- an order for the issue of a warrant for recovery of a child by force.

### **Who is the Central Authority?**

The central authority can be appointed by the Commonwealth Attorney-General. The applications in Queensland are brought by the Department of Communities (Child Safety Services).

### **The basis steps**

These applications are not determined based on the 'best interests' principle outlined in the Family Law Act 1975. They are determined only on the specific elements contained in the regulations.

Here is the basic checklist:

1. Does the person on whose behalf the Central Authority is applying have a 'right of custody'?
2. Is there removal of the child?
3. Is the application filed within one year after the child's removal or retention?
4. Is the child under 16?
5. Was the child habitually a resident in a convention country immediately before the removal to, or retention in Australia?
6. Is the removal of the child in breach of those rights of custody?
7. Was the person on whose behalf the application is made exercising that right of custody at the time of the child's removal or retention, and would they have exercised those rights had the child not be removed or retained?

If questions 1 – 7 are "yes", then the Court must make the order, subject to questions 8 onwards.

8. Was there consent or acquiescence to the removal? If so, a defence is established.
9. Was the person not actually exercising their rights of custody? If so, a defence is established.

10. If the child was returned, is there a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. If so, then a defence is established.
11. If the application is filed more than 12 months after the date of removal/retention, and the child is settled in the child's new environment? If so, a defence is established.
12. Does the child object to being returned? Does the child's objection show a strength of feeling beyond the mere expression of a preference or of ordinary wishes? Has the child attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views? If so, a defence is established.
13. Would the return of the child not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms? If so, a defence is established.
14. If one of the defences in paragraphs 9 – 13 is established, then would a Court, in the exercise of its discretion, not order the return of the child taking into account the relevant matters? If so, then the application for a return order fails.

### **What is a right of custody?**

A right of custody is more than a right for a child to live with, or reside with a parent. Rights of custody include rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child. Each of the parents of a child who is not 18 has parental responsibility for the child. Rights of custody arise, for these purposes, for all parents unless there is an order for sole parental responsibility for one parent. Such rights of custody may arise;

- a. by operation of law; or
- b. by reason of a judicial or administrative decision; or
- c. by reason of an agreement having legal effect under a law in force in Australia or a convention country.

### **Habitual Residence**

A person, institution or other body has rights of custody in relation to a child only if the child was habitually resident in Australia or in another convention country immediately before the child's removal or retention. It seems that if a child lives, primarily, in a country the child will be ordinarily resident there. Problems may arise if there are repeated changes of residence by the parents in the year prior to the removal.

### **What is 'exercising' a right of custody?**

Case law seems to suggest that this issue is broadly determined. This element will be satisfied provided that the parent is involved, to some extent, in the decisions concerning the long term matters of a child, and some involvement, or decision making, in the child's day to day care.

### **Is the removal or retention in 'breach' of the rights of custody?**

Removal and retention are mutually exclusive concepts. 'Removal' involves the physical removal of a child to another country. 'Retention' occurs when a child remains in another country beyond the period consented to by the other parent. It seems that, provided the removal or retention of the child was inconsistent with one parent's right of custody, then the removal or retention will be in breach of the other parent's right of custody.

### **How can I defend an application for return?**

As outlined above, it is very easy to establish the above elements. However, there are four (4) main defences that can be used to defend an application for return.

Those defences are;

1. The application has been filed more than 12 months after the date of removal, and the child is settled in his/her new environment;
2. consent/acquiescence;
3. objections of the child; and
4. Grave Risk.

Establishing one of the above defences on the balance of probabilities does not mean the Court must not make a return order. It will still be at the Court's discretion whether or not an order should be made.

### **Other Important Information**

Remember, if there are any parenting orders in place, each parent must not take or send the child/ren from Australia to a place outside Australia. The penalty is imprisonment for 3 years.

In the event that you suspect your ex-partner may wish to unilaterally take your child/ren overseas without your consent, you should seek urgent legal advice and file an urgent application for the child or children's names to be placed on the Airport Watch list.

### **Advice**

"You should contact **Michael Sing Lawyers Pty Ltd** to obtain urgent legal advice if you are concerned that your ex partner may travel overseas with your children without your consent or if you wish to defend an application for a return order," warned Mr Abdelshahied, lawyer, **Michael Sing Lawyers Pty Ltd**.

"There are a number of protective measures that can be incorporated when drafting parenting orders" says Mr Abdelshahied. **Michael Sing Lawyers Pty Ltd** can assist with drafting parenting orders that best deal with your situation, whether you wish to seek that a child remains in Australia or alternatively an order for the child/ren to reside in another country.

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If you have an issue involving family law, please contact the **Michael Sing Lawyers Pty Ltd** family law team in Brisbane on (07) 3229 6099 or the Gold Coast on (07) 5597 8888 to arrange a consultation.



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