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BAHAMAS

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Bahamas acceded to the Hague Convention on the Civil Aspects of International Child Abduction, [hereinafter the Hague Convention] on January 1, 1994, and the Hague Convention went into force between the Bahamas and the United States on that same date. Since then, the Hague Convention has gone into force between the Bahamas and 27 other parties as a result of declarations of acceptance by other original members and mutual declarations of acceptance by the Bahamas and other states that have acceded to the Hague Convention.¹

I. Domestic Laws and Regulations Implementing the Hague Convention

On July 30, 1993, the International Child Abduction Act, 1993, received Royal Assent and came into force in the Bahamas.² Since treaties are not self-executing or automatically in force upon ratification in the Bahamas, this statute incorporates the text of the Hague Convention as a schedule to the Act. The body of the Act consists of 11 sections. In sections 2 and 3, the Minister for Foreign Affairs is designated to be the Central Authority for the purposes of the Act. Section 4 declares that the Supreme Court of the Bahamas has jurisdiction to entertain applications made under the Hague Convention, and section 5 gives it authority to issue interim orders when Convention applications are pending. Section 6 gives the Minister of Foreign Affairs authority to request reports in pending cases of the Ministries of Social Services and Health, as well as of the courts. Section 7 provides that foreign decisions or determinations in custody cases and other relevant proceedings may be proved with “duly authenticated copies.” Section 8 authorizes the Supreme Court to make findings that the removal of a child from the country was wrongful under the Hague Convention, and section 9 provides for the payment by the government of membership fees. Section 10 gives the Rules Committee of the Supreme Court rule-making powers with respect to procedures, notices, authenticated copies, and other objects of the Act. Section 11 authorizes the Minister of Foreign Affairs to amend the Schedule to bring it into conformance with any changes to the Hague Convention.

The only reported amendment to the International Child Abduction Act, 1993, corrected a mistake in the original statute to add the word “may” to section 10 so that it reads “the Rules Committee may make rules for ... carrying out the objects of [the] Act.”³

¹ See <http://www.hcch.net/e/status/abdshte.html>.

² 1993 Bah. Laws, No. 27.

³ 1996 S.I. No. 38.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The International Child Abduction Act does not contain prohibitions on the abduction of children. For the applicable criminal laws, reference must be made to the Penal Code of the Bahamas. The version of the Penal Code that was in force in the Bahamas at the time that the Hague Convention entered into force for that country contains several provisions applicable to child abduction. The first of these states that “whoever kidnaps any person shall be liable to imprisonment for 10 years.”⁴ The Code defines “kidnapping” to include unlawfully imprisoning any person and taking him out of the jurisdiction of the Bahamian courts without his consent.⁵ Because the consent of a child would be a defense to the charge of kidnapping, securing a conviction under this section can often be difficult. Therefore, in appropriate child abduction cases, the abducting parent might be alternatively charged with the crime of stealing another person under the age of 14. The Penal Code defines this crime, which is also punishable with up to 10 years imprisonment,⁶ to include unlawfully taking or detaining a person “with intent to deprive of the possession or control of him any person entitled thereto.”⁷ However, in this case, the law also generally provides that “a person is not guilty of stealing ... another person by anything that he does in the belief that he is entitled by law as a parent or guardian.”⁸ Thus, in cases brought against a parent for unlawfully stealing a child, it might often be necessary to show that the parent acted in defiance of a court order or other official warning that had been communicated to him.

In the case of females, the Penal Code provides that “a person is guilty of abduction of a female who, with intent to deprive of the possession or control of the female any person entitled thereto ... unlawfully takes her from the lawful possession, care or charge of any person” or “detains her from returning to the lawful possession, care or charge of any person.”⁹ This crime is punishable with up to 2 years imprisonment. In the case of females between the age of 16 and 17, having had reasonable cause to believe the woman was 18 or older is a valid defense. The Penal Code does not contain similar provisions for the abduction of males.

B. Parental Visitation

At the date that the Hague Convention went into force for the Bahamas, section 7 of the Guardianship and Custody of Infants Act stated as follows:

The [Supreme] Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parties, and to the wishes as well of the mother as of the father, and may alter, vary,

⁴ Penal Code, Rev. Laws Bah. Ch. 77, s. 291 (1987).

⁵ *Id.* § 306.

⁶ *Id.* § 292.

⁷ *Id.* § 308.

⁸ *Id.* § 309(4).

⁹ *Id.*

or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act; and in every case may make such order respecting costs as it may think just.

The power of the court under subsection (1) of this section to make an order as to the custody of a child and the right of access thereto may be exercised notwithstanding that the mother of the child is then residing with the father of the child.¹⁰

This section has not been interpreted in any reported decisions from the courts of the Bahamas, but would appear to give the Supreme Court broad powers in matters respecting visitation. The available laws of the Bahamas do not indicate that section 7 has been amended since the Hague Convention went into force for the Bahamas.

III. Court System and Structure – Courts Handling the Hague Convention

As was mentioned previously, the International Child Abduction Act gives the Supreme Court of the Bahamas responsibility for hearing Hague Convention applications.¹¹ The Supreme Court, consisting of 12 appointed justices, is both a trial court and an appeals court for decisions rendered by the lower magistrate courts. There are 2 justices assigned to the Supreme Court in Freeport to hear cases from the Northern Region of the country.¹² The other justices are assigned to the Supreme Court in the capital region of New Providence.

Appeals of decisions of the Supreme Court justices may be heard by the Court of Appeal. The Court of Appeal, which has jurisdiction in criminal, constitutional, and civil matters, consists of six justices, but panels of three justices are formed to decide most cases. The Court of Appeal operates under a separate statute¹³ and a separate set of rules from the Supreme Court.¹⁴

The Bahamas was a British colony until 1973. Under the terms of the independence order that established a Constitution for the Bahamas, a provision was made for retention of final appeals to the Judicial Committee of the Privy Council in conformance with the provisions of the British statutory instruments establishing that body.¹⁵ Similar provisions in London were inserted in the Constitutions of the other Commonwealth Caribbean countries when they attained independence and for many years, the Privy Council has served as a common high court for most of the Commonwealth Caribbean countries. However, in recent years, most of the former British colonies in the region have agreed to replace the Privy Council with a Caribbean Court of Justice. At the present time, the inauguration of this court has been postponed until the end of 2004.¹⁶ One country that appears to have decided to retain the Privy

¹⁰ III Bah. Rev. Laws, ch. 118, § 7 (1987).

¹¹ 1993 Bah. Laws, No. 27, § 4.

¹² See <http://bahamas.gov.bs/bahamasweb/aboutthegovernment.nsf/subjects/judiciary>.

¹³ Court of Appeal Act, II Bah. Rev. Laws, ch. 40 (1987), as amended.

¹⁴ Supreme Court Act, II Bah. Rev. Laws, ch. 41 (1987), as amended.

¹⁵ Constitution, 1973 S.I. No. 1080, § 105.

¹⁶ *Caribbean Politics: Creation of Caribbean Court Delayed Again*, Economist Intelligence Unit, Feb. 17, 2004.

Council as its highest court is the Bahamas, despite the fact that the actual number of cases that are taken from Nassau to London every year is very small. Nevertheless, as long as the Privy Council remains the highest court for the Bahamas, the possibility exists that a Hague Convention case may be appealed outside of the jurisdiction. The Privy Council usually hears cases in panels composed of British Law Lords joined by a justice of a participating jurisdiction. Since the Privy Council generally follows British precedents, the British influence in the Bahamian legal system will continue.

IV. Law Enforcement System

There are no available reported decisions in which the Hague Convention has been interpreted by Bahamian judges. However, the reports on compliance prepared by the U.S. Department of State indicate that enforcement of the treaty in that country has been a persistent problem. In the 2003 report, the Department of State wrote as follows:

In our April 2001 report, the Bahamas was listed as a Country of Concern. Despite recent action taken to move long-standing cases forward through the courts, we do not believe that the Bahamas's performance has improved. The judicial and administrative authorities continue to fail to act expeditiously in proceedings for the return of a child as required by article 11. There are currently no open cases for the Bahamas. The case that was open previously for over [5] years has been resolved in court, and the Supreme Court ordered the child to remain in the Bahamas with the taking parent. The other case mentioned in the 2001 Compliance Report that was open for [3] years has also been resolved in the courts with the court finding return to the [United States] was not required under the Hague Convention. A case opened in December 2001 has been closed at the left-behind parent's request.

The Bahamian Central Authority is consistently non-responsive to inquiries and requests by the Central Authority in the United States as required pursuant to article 7. The Bahamian Central Authority has also been non-responsive to repeated representations by the U.S. Embassy during the past year.¹⁷

No information respecting any subsequent developments is currently available.

V. Legal Assistance Programs

The Hague Conference on Private International Law's status sheet for the Hague Convention does not indicate that in acceding to the Hague Convention, the Bahamas made a reservation that it would not be bound to assume any costs relating to applications resulting from the participation of legal counsel or advisers. However, whether financial assistance might be available to foreign parties seeking the return of a child abducted to the Bahamas is not clear. The failure of the Bahamas to provide legal aid in at least certain types of appellate proceedings was criticized by the Inter-American Commission on Human Rights in 2001.¹⁸ Section 9 of the International Child Abduction Act does authorize the Government to pay out sums for the purposes of the Hague Convention, but there does not appear to be a formal scheme for private applications for such sums.¹⁹

¹⁷ U.S. Department of State, 2003 COMPLIANCE REPORT, at 10, available at <http://travel.state.gov/2003haguereport.html>.

¹⁸ Report No. 48/01, available at <http://www.cidh.org/annualrep/2000/eng/ChapterIII/Merits/Bahamas12.067.htm>.

¹⁹ 1993 Bah. Laws, No. 27, s. 9.

VI. Conclusion

The Hague Convention has been fully incorporated into Bahamian law. However, although there are no reported Hague Convention cases from the courts of that country, the experiences documented in the U.S. Department of State's compliance reports indicate that officials have not processed applications with the due diligence required by the agreement. The few cases mentioned in these reports to actually be heard by the judiciary did not result in the return of children who had been allegedly abducted. Therefore, it does not seem that the Bahamas has yet established a practice of returning abducted children under the terms of the Hague Convention.

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