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BERMUDA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

Bermuda is an Overseas Territory of the United Kingdom. A Governor, appointed by the Queen of the United Kingdom, is responsible for the defense, police, and internal and external affairs of the country. The Governor is required to consult with the Governor's Council, which is composed of the Governor, the Premier, and two or three Cabinet Ministers nominated by the Premier. The Bermuda legislature enacts domestic laws. The United Kingdom extended the Hague Convention on the Civil Aspects of International Child Abduction¹ to Bermuda through a Note that was filed with the Ministry of Foreign Affairs in the Netherlands on December 21, 1998. The extension of the Convention to Bermuda was recognized by the United States on March 1, 1999.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Convention was implemented in Bermuda by the International Child Abduction Act 1998² and the Children Act 1998.³ The Children Act 1998 was substantially amended in 2002 to "remove any distinction in law between children born inside or outside marriage ...[and to] reform the law governing custody of and access to children."⁴

II. Domestic Laws Regarding Child Abduction and Parental Visitation**A. Child Abduction**

There are a number of laws in Bermuda that address the issue of child abduction, ranging from criminal offenses to preventive measures. Generally, the laws of Bermuda define a child in the context of family law as being under the age of 18. However, this age varies in some criminal statutes, as well as in the International Child Abduction Act where, in accordance with the Convention, a child is defined as an individual under 16 years of age.⁵

¹ Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980 T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter "the Convention"].

² International Child Abduction Act 1998 : 23.

³ The Children Act 1998 : 38, as amended. This Act also appears to be referred to as the Children and Care Services Act 1998.

⁴ The Children Amendment Act 2002 : 36.

⁵ *Supra* note 2, § 2.

1. The Criminal Code

The Criminal Code of Bermuda⁶ provides that it is a misdemeanor to abduct an unmarried girl under 16 years⁷ of age from the custody or protection of her father, mother, or any other person lawfully in charge of her. Anyone found guilty of this misdemeanor is liable upon conviction by “a court of summary jurisdiction to imprisonment for 12 months, and on conviction on indictment, imprisonment for 2 years.”⁸ The defense that the offender believed that the girl was over the age of 16, or that she was taken with her consent, or at her suggestion, is expressly excluded from this offense.⁹

The Criminal Code also makes it an offense to remove a child under 14 years of age from his parent, guardian, or any other person lawfully in charge of the child:

203(1) Any person who, with intent to deprive any parent, guardian, or other person who has the lawful care or charge of a child under 14 years of age, of the possession of such child that

(a) forcibly or fraudulently takes or entices away or detains the child

(b) receives or harbors the child, knowing [him] to have been so taken or enticed away or detained

is guilty of a felony, and is liable to imprisonment of 4 years.

203(2) It is a [defense] to a charge or any of the [offenses] constituted by this section to prove that the accused person claimed a right to the possession of the child, or, in the case of an illegitimate child, is its mother or claimed to be its father.¹⁰

B. Parental Visitation

In cases of parents seeking divorce, the court in Bermuda cannot make “absolute a decree of divorce or of nullity of marriage, or grant a decree of judicial separation, unless the court, by order” is satisfied that appropriate arrangements for children within the family have been made.¹¹

Custody and access of children is governed by the Children Act 1998. Under this Act, the Court is bound to determine custody of, and access to, children on the basis of what is in the best interests of

⁶ Criminal Code Act 1907 : 13.

⁷ *Id.* § 188. In cases where the abduction is with “the intent to have carnal knowledge” of the girl, the age is raised to 18.

⁸ Criminal Code Act 1907, § 202.

⁹ *Id.* § 202(2-3).

¹⁰ *Id.* § 203.

¹¹ Matrimonial Causes Act 1974: 74, as amended, § 45.

the child.¹² The court can take into account the views and preferences of a child¹³ and, where an application is made for an order of access to the child, the court can appoint a professional to assess and report on the “needs of the child and the ability and willingness of the parties ... to satisfy the needs of the child,”¹⁴ and bases its decision accordingly.

C. Child Access and Custody Cases Involving Multiple Jurisdictions

The Children Act 1998 provides that in cases where jurisdiction is being exercised by judicial tribunals in other states or territories, the courts in Bermuda “will, unless there are exceptional circumstances, refrain from exercising or decline jurisdiction in cases where it is more appropriate for the matter to be determined by a tribunal having jurisdiction in another place with which the child has a closer connection.”¹⁵ As such, the courts in Bermuda will only exercise their jurisdiction if the child is habitually resident¹⁶ in Bermuda at the commencement of the application for an order of access or custody, or in cases where the child is not habitually resident, but where:

- [he] is physically present in Bermuda at the commencement of the application
- substantial evidence concerning the welfare of the child is available in Bermuda
- no application for custody of or access to the child is pending before an overseas tribunal in another place where the child is habitually resident
- no overseas order in respect of custody of or access to the child has been recognized by a court in Bermuda
- the child has a real and substantial connection with Bermuda
- on the balance of convenience, it is appropriate for the jurisdiction to be exercised in Bermuda.¹⁷

The Court can, however, supersede an order,¹⁸ or make or vary regarding the custody of, or access to, a child if the child is present in Bermuda and the court believes that the child would, on the balance of probabilities, suffer serious harm if he was to remain with the custodial parent, be returned to the custody of the custodial parent, or be removed from Bermuda.¹⁹

¹² *Supra* note 4, at § 36B(a).

¹³ *Id.* § 36(I).

¹⁴ *Id.* § 36E.

¹⁵ *Id.* § 36B(b).

¹⁶ *Id.* § 36L(3). Removing or withholding the child in another country without the consent of the custodial parent does not alter the place of habitual residence unless there has been an undue delay in the commencement of proceedings from the custodial parent.

¹⁷ *Id.* § 36L(1).

¹⁸ *Id.* § 36R.

¹⁹ *Id.* § 36M

The courts in Bermuda can also, upon application, supersede orders from an overseas tribunal if there has been a material change in circumstances that affects, or is likely to affect, the welfare of the child. A number of additional criteria must be met before the court will exercise its jurisdiction under this section, including the requirement that the child is habitually resident in Bermuda and no longer has a real and substantial connection with the place where the overseas order was made.²⁰

In cases of custody and access orders made by overseas tribunals, the courts in Bermuda recognize the orders as enforceable unless:

- the respondent was not given reasonable notice about the commencement of proceedings, or an opportunity to be heard in the proceedings
- the law of the jurisdiction in which the order was made did not require the tribunal have regard to the welfare or best interests of the child
- the order of the overseas tribunal is contrary to public policy in Bermuda
- the overseas tribunal would not have had jurisdiction if it were a court in Bermuda.²¹

In cases of conflicting orders from different overseas tribunals, the courts in Bermuda recognize and enforce the order that “appears to the court to be most in accord with the welfare of the child.”²²

To avoid any conflict between custody orders and the operation of the Convention, the International Child Abduction Act provides that “when an order is made for the return of a child ... any custody order relating to him will cease to have effect.”²³

The International Child Abduction Act defines the merits of rights of custody mentioned in article 16 of the Convention as “making, varying, revoking or enforcing a custody order.”²⁴

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

A. Family Proceedings Generally

The court in Bermuda that addresses family matters is the Family Court and, in certain cases, the Magistrates’ Court and the Supreme Court.²⁵

²⁰ *Id.* § 36Q.

²¹ *Id.* § 36P.

²² *Id.* § 36P(4).

²³ *Supra* note 2, § 13.

²⁴ *Id.* § 11.

²⁵ Children Act 1998, § 2.

B. Under the Convention

The Supreme Court of Bermuda is the court specified in the International Child Abduction Act to have jurisdiction to consider applications under the Convention.²⁶ When an application has been made to the court under the Convention it can give interim directions either to secure the welfare of the child concerned or to prevent a change in circumstances that are relevant to the determination of the application.²⁷ The court can also declare that the “removal of any child from, or retention outside of, Bermuda is wrongful within the meaning of article 3 of the Convention.”²⁸

The Supreme Court Act 1905²⁹ provides that applications under the Convention are to be made by originating summons that contains:

- the name and date of birth of the child in respect of whom the application is made
- the names of the child’s parents or guardians
- the whereabouts, or suspected whereabouts, of the child
- the interest of the plaintiff in the matter and the grounds of the application
- particulars of any proceedings (including proceedings out of the jurisdiction and concluded proceedings) relating to the child.³⁰

IV. Law Enforcement System

The Central Authority in Bermuda is the Attorney General.³¹

The enforcement powers of the courts with respect to custody and access orders have been substantially strengthened by the Children Amendment Act 2002, providing a number of ways to enforce custody and access orders and preventive measures to stop the removal of children from Bermuda.

The Act allows the court, on application, to issue orders to restrain individuals from harassing, molesting, or annoying the applicant and the child within the lawful custody of the applicant.³² In cases where the court believes that children are being unlawfully withheld from the custodial parent, or parent with rights of access, it can authorize the wronged party, or someone acting on behalf of the wronged party, to “apprehend the child for the purpose of giving effect to the rights of the applicant to custody or access.”³³

²⁶ *Supra* note 2, § 6.

²⁷ *Id.* § 7.

²⁸ *Id.* § 10.

²⁹ Rules of the Supreme Court 1985, GN 470/1985, as amended.

³⁰ *Id.* Order 118.

³¹ *Supra* note 2, § 5.

³² *Supra* note 4, § 36S.

³³ *Id.* § 36T.

If the court, upon application, believes that there are reasonable and probable grounds that:

- the child is being withheld from a person entitled custody of, or access to, the child
- a person prohibited from removing a child from Bermuda by a court order or separation agreement is proposing to do so
- a person entitled to access to the child proposes to remove the child from the jurisdiction and not return him

the court it can make an order directing the Provost Marshal General and/or a police officer to locate, apprehend, and deliver the child to a person named in the order.³⁴

If the custodial parent fails to comply with an order from the court granting access to the child to the other parent, the court can impose conditions to ensure that the non-custodial parent has access, require the monitoring or supervising of rights of access by a children's officer, or require that the parents mediate the matters in dispute with a children's officer, or another person appointed by the court.³⁵

In addition to this, to prevent the unlawful removal of children from Bermuda, the courts can, upon application, issue an order requiring a person to:

- transfer property to a specified trustee to be held on conditions specified in the order
- in cases where child support payments have been ordered, make the payments to a specified trustee
- post a bond of an amount considered appropriate by the court, with or without sureties, payable to the applicant
- deliver to the court their passport, the child's passport, and any other travel documents that the court may specify, or other individual specified by the court.³⁶

If a court is satisfied that a child has been wrongfully removed to, or is being wrongfully retained in Bermuda it can:

- make an interim order for custody or access if it is appropriate for the welfare of the child
- order a party to return the child to such a place as the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application.³⁷

To prevent the abduction of children from parents during divorce proceedings, the petitioner or respondent can make an *ex parte* application to a judge for an order that prohibits the removal of a child

³⁴ *Id.* § 36T(2).

³⁵ *Id.* § 36F.

³⁶ *Id.* § 36U(3).

³⁷ *Id.* § 36O(c) and (e).

under the age of 18 from the family from Bermuda without the leave of the court, unless terms can be specified in the order.³⁸

V. Legal Assistance Programs

Bermuda has made a reservation that the costs mentioned in article 26 will not be born by any Minister or authority in Bermuda.³⁹ However, it provides that Legal Aid may be provided to applicants in accordance with the provisions of the Legal Aid Act 1980.⁴⁰

The Legal Aid Act 1980 provides legal aid on a means tested basis to parties in civil proceedings and appeals, accused persons in criminal trials, and appellants in criminal appeals.⁴¹ The basic requirement for legal aid is that the applicant have a disposable income of less than \$12,000 Bermudan dollars (US\$12,060) a year and disposable capital of less than \$10,000 Bermudan dollars (US\$10,0050). Individuals granted legal aid may be required to pay a sum of money into a Consolidated Fund if their disposable income is more than \$5,000 Bermudan dollars (US\$5,025) a year and they have more than \$5,000 in disposable capital.⁴²

VI. Conclusion

The Children Amendment Act 2002 substantially revised Bermuda's family laws concerning custody to and access of children. This Act established a comprehensive system of laws that allows the implementation of preventive measures to try and deter potential abductors from removing children from Bermuda. This system, combined with measures under the International Child Abduction Act, attempts to ensure that the welfare of the child involved is protected in all cases.

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³⁸ Matrimonial Causes Rules 1974, § 94.

³⁹ *Supra* note 2, § 13.

⁴⁰ Legal Aid Act 1980 : 56.

⁴¹ *Id.* §§ 3 & 10.

⁴² *Id.* § 11.