

LAW LIBRARY OF CONGRESS

REPUBLIC OF IRELAND

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Republic of Ireland is comprised of 26 counties grouped together in four provinces. The Republic covers a great deal of the island of Ireland; the remainder, Northern Ireland, is a part of the United Kingdom.

Even before 1991, when Ireland gave effect to the Hague Convention on Civil Aspects of International Child Abduction, Ireland's legislation focused on the well-being of the child rather than any "rights" of a parent.

The Constitution of Ireland, adopted in 1937, recognizes the "Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law." Further, the state "guarantees to protect the family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."¹

The Guardianship of Infants Act 1964² (1964 Act) provides instruction for the care of children upon the breakup of a marriage:

Sec. 3. Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration.

Under the 1964 Act the preference is to give joint guardianship to both parents. The 1964 Act also provides for court orders for custody, access, maintenance, and fit person orders. The intent of the 1964 Act intent is to provide an order that promotes the well-being of the child in question.

The Status of Children Act 1987³ eliminates the differences between legitimate and illegitimate children, allowing for the protection of both. The Judicial Separation and Family Law Reform Act 1989⁴ refines the idea of custody in cases of judicial separation.

This report reviews the domestic legislation implementing the Hague Convention, domestic legislation regarding child abduction, the court system and structure for handling child abduction cases, the law enforcement system in place to handle these incidents, and legal aid available to assist applicants.

¹ Art. 41, the Constitution of Ireland, 1937.

² No. 7 (1964).

³ No. 26 (1987).

⁴ No. 6 (1989).

The report concludes that Ireland's legal, court, law enforcement system, and legal aid have been set up to meet the goals of the Hague Convention.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Child Abduction and Enforcement of Custody Orders Act 1991⁵ (1991 Act) gives effect to the Hague Convention. The 1991 Act gives the Hague Convention the force of law in Ireland, and provides that it receives judicial notice.⁶ The 1991 Act, as amended by section 55 of the Family Law Act 1995⁷ and section 18 of the Children Act 1997,⁸ establishes Ireland's Central Authority to act under the Hague Convention. The 1991 Act applies to children under the age of 16 who are habitual residents in a contracting state.

More recently, the Protection of Children (Hague Convention) Act, 2000 (2000 Act) gave effect to another Hague Convention of October 19, 1996, on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measures For The Protection Of Children. The 1996 Convention builds on the previous by determining priority when conflicts arise when authorities in different countries are asked to take measures regarding the same child, granting preference to the authorities of the child's habitual residence, except in emergencies. Section 17 of the 2000 Act amends the 1991 Act by authorizing the Central Authority to obtain any information which would assist in discovering the whereabouts of the child.

In 2001, a regulation that was issued inserted Order 133 into the Rules of the Superior Courts to provide for rules regarding child abduction.⁹ These rules help clarify the exact procedure necessary for such a case.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

In 1997, Ireland passed the Non-Fatal Offenses Against the Persons Act, 1997 (1997 Act).¹⁰ Sections 16 and 17 specifically relate to child abduction.

Section 16 of the 1997 Act applies to a parent, guardian, or a person to whom custody of a child under the age of 16 has been granted by a court. Under Section 16, a person is guilty of an offense, who takes, sends, or keeps a child under the age of 16 out of the state or causes a child under that age to be so taken, sent, or kept, (a) in defiance of a court order or (b) without the consent of each person who is a parent, a guardian, or a person to whom custody of the child has been granted by a court, unless the consent of the court was obtained.

⁵ No. 6 (1991).

⁶ *Id.* § 6. A foreign law decision is not normally judicially noticed, i.e., taken notice of by the court without proof.

⁷ No. 26 (1995).

⁸ No. 40 (1997).

⁹ S.I. 2001, No. 94.

¹⁰ No. 26 (1997).

Section 17 of the 1997 Act applies to persons not covered in Section 16, which would include non-custodial parents. Section 17 states that a person, other than those to whom section 16 applies, is guilty of an offense who, without lawful authority or reasonable excuse, intentionally takes or detains a child under the age of 16, or causes a child under that age to be so taken or detained, (a) so as to remove the child from lawful control of any person having lawful control of the child; or (b) so as to keep him or her out of the lawful control of any person entitled to lawful control of the child.

Both Section 16 and Section 17 include prison terms, as well as fines, for convicted offenders. Thus, the 1997 Act goes further than the Hague Convention by making abduction out of the state a criminal offense.¹¹

B. Parental Visitation

The Guardianship of Infants Act 1964 (1964 Act)¹² covers parental rights of guardianship, custody, and access to children upon the breakup of a marriage. As stated in the introduction, the preference of the 1964 Act is to provide joint guardianship. However, that preference may be overcome by circumstance. The High Court has jurisdiction for all matters dealing with the guardianship of infants. In response to a parental application to it, the Court may give directions as to what it thinks is proper regarding the right of access to the infant by the mother or father. Section 18 of the 1964 Act, dealing with custody upon separation of the parents, was repealed by the Judicial Separation and Family Law Reform Act 1989 (1989 Act).¹³ The 1989 Act provides that when the court grants a decree of judicial separation, it may declare either spouse to be unfit to have custody of any dependent child of the family.¹⁴

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

Ireland's court system and structure are consistent with the Hague Convention goals of informality and expediency.

The courts receive their authority from articles 34 through 37 of the Irish Constitution. Under the 1991 Act, the High Court may receive cases from the Central Authority, or the Court may take cases directly without intervention of the Central Authority. While the High Court has jurisdiction of first instance for cases arising under the Hague Convention, the Supreme Court of Ireland has the authority to review the High Court's decisions.

The 1991 Act, implementing the Hague Convention, uses the 1989 Act to express the requirements of court proceedings. It calls for an informal and fair process. It requires that family law proceedings before the High Court shall be as informal as is practicable and consistent with the administration of justice.¹⁵ In hearing and determining such proceedings under the Hague Convention, neither the judges

¹¹ The U.S. Department of State notes several risks to filing criminal charges in an international child abduction case, *available at* <http://travel.state.gov/inf/lchildabduction.html#part7> (last reviewed Dec. 2, 2003). Review of these risks with respect to Ireland is beyond the scope of this report, but researchers should be aware of the issue.

¹² No. 7 (1964).

¹³ No. 6 (1989).

¹⁴ *Id.* § 41.

¹⁵ *Id.* § 33 (3).

sitting in the High Court, nor the barristers or solicitors appearing in the proceedings, wear wigs or gowns.¹⁶ The informality is intended to foster a less adversarial proceeding.

The High Court of Ireland has jurisdiction to hear and determine applications under the 1991 Act. Prior to its enactment, the High Court was the proper place to hear child abduction cases, so the Act did not affect pre-existing law. The High Court is available 24 hours a day, which satisfies the expediency requirement of the Hague Convention. There are cases where the Court will have to make a child a ward of the court, which is within the jurisdiction of the High Court. The High Court is also experienced in child abduction cases which arise in an international setting that also raise constitutional questions. As a result, the High Court may receive direct applications from those seeking help. The High Court also has the power to discharge any order regarding the custody of, or access to, the child, so long as it is making an order under the Hague Convention.¹⁷

Prior to its determination of an application under the Hague Convention, the High Court may also give interim directions as it thinks fit, on its own motion or on an application, for securing the welfare of the child, or preventing prejudice to the interested persons or changes in the circumstances relevant to the determination of the application. The High Court also has the authority to order any person to disclose any relevant information regarding the whereabouts of the child. As a result, the person revealing information may not rely on the rule against self incrimination or the incrimination of a spouse. However, the same person is protected from having the information admitted to prove perjury and perjury of a spouse.

In making determinations under the Hague Convention the High Court may refuse the return of a child. In certain cases, the Court may refuse to return a child if:

- The person opposing the return of the child establishes that the person who had the child in the other state did not exercise rights of custody at the time of his removal;
- There is a grave risk that return of the child would expose him to physical or psychological harm or place him in an intolerable situation;
- The child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of his views.

The court may also refuse the return of a child if it would be contrary to the fundamental principles of the state relating to the protection of human rights and fundamental freedoms. The following cases are illustrative:

In *Northampton County Council v. ABF and MBF*,¹⁸ the return of a child to England was refused, because doing so would have created an adoption without consent of one of the parents. In this decision, the Court relied heavily on article 41 of the Irish Constitution. It understood article 41 to grant the father the right to enforce his rights as the natural father in a foreign jurisdiction. The Court believed that this result was in concert with the protection of the rights of the father and the infant pursuant to article 41.

¹⁶ *Id.* § 33 (4).

¹⁷ Child Abduction and Enforcement of Custody Orders Act 1991, § 6.

¹⁸ (1982) I.L.R.M. 164 (MC).

In *Kent County Council v. C.S.*,¹⁹ the Court returned a child abducted from England. The Court found that although the family received the highest protection from the Constitution, it would be in the best interests of the child to be returned to England. This decision shows that although Ireland was late in adopting the Hague Convention, its judicial decisions incorporate its ideology.

In more recent decisions, Irish courts have continued their tradition of acting in the best interests of the child. In *T.M.M. v. M.D.*,²⁰ two children were removed from England to Ireland by their maternal grandmother. In looking at the circumstances of the situation, including the opinion of one of the children,²¹ the children were not returned to their mother due to the grave risk of physical and psychological harm it would have caused.

In *W.P.P. v. S.R.W.*,²² the Court differentiated between rights of custody and rights of access. A mother who had full custody of her children removed them from California to Ireland. The Court held the father's right to access did not require the return of the children to the jurisdiction in which they had been habitual residents.

In *Minister for Justice, Equality and Law Reform v. C. (V.)*,²³ the High Court emphasized that the date of determining a child's habitual residence under section 3 of the Hague Convention is the date immediately before the removal or retention, and applied that rule to a situation where it was unclear when retention had occurred.

In *H. (D.G.) & Ors v. H. (T.C.)*,²⁴ the High Court reviewed sections 6 of the 1991 Act, section 11 of the 1991 Act article 29 of the Hague Convention, and the Superior Courts Rules Committee construction of the 1991 Act in the provisions of Order 133²⁵ and determined that while the Central Authority could be included in a proceeding where appropriate, nothing required the Central Authority to commence proceedings in the High Court, even if the applicant chose to make an application to the Central Authority for the return of the children in question. In other words, an applicant may act in his own name and commence proceedings in the High Court.

IV. Law Enforcement System

Pursuant to its powers, the Irish Central Authority will take steps to locate a child who has been abducted into the state. It will also seek the return of the child or secure access to the child. If required, the Central Authority will also arrange for court proceedings to secure the return of, or to secure access to, the child. Should a child be abducted from the state, the Central Authority will assist the wronged party in seeking the return of the child. The Central Authority will also take upon itself the task of

¹⁹ (1984) I.L.R.M. 292 (MC).

²⁰ (1999) I.E.S.C. 8.

²¹ Judge McGuinness spoke with the older of the children who was 11 years old. The Judge found the child to be mature enough to appropriately take her views into account, pursuant to art. 13 of the Hague Convention.

²² (2000) I.E.S.C. 11.

²³ (2002) I.E.H.C. 52 (26 Apr. 2002).

²⁴ (2003) I.E.H.C. 47 (24 June 2003).

²⁵ *Supra* note 7.

gathering and sending information about the abducted child to other Central Authorities. The Central Authority will not impose charges in relation to applications submitted to it, but it may, however, recoup the expenses it incurred in bringing the child back home.

Through An Garda Síochána (Guardians of the Peace, i.e., the police) the Central Authority can detain a child it suspects is about to be or is being removed from the state in a breach of an order of the High Court. When this occurs, the Garda must return the child to the person who had been awarded custody or access to the child at the earliest opportunity. If the child in question is in the custody of the Health Board, the Garda must return the child immediately to the Health Board. When this occurs, the Garda are required to inform the child's parent, the person acting in loco parentis, or the Central Authority, as soon as possible.

V. Legal Assistance Programs

The Central Authority refers cases to the Legal Aid Board. Law Centres were set up in Ireland by the Scheme of Civil Legal Aid and Advice in 1980,²⁶ as a response to Ireland becoming a party to the European Agreement on the Transmission of Applications for Legal Aid in 1977. Law Centres give legal aid in family law matters. The Legal Aid Board was created by the Civil Legal Aid Act 1995 (1995 Act).²⁷ The 1995 Act gave the Scheme a statutory backing and set out to regulate the powers and duties of the Board. It also established the criteria for the granting of legal aid and advice, as well as the initiation of litigation for which it is proper to have legal aid. The Law Centres are staffed by full time solicitors and provide mainly family law services.

In order to receive legal aid, an applicant must usually pass both a merits and a means test.²⁸ However, applicants under the Hague Convention are entitled to legal aid “where the Central Authority in the state, within the meaning of the Child Abduction and Enforcement of Custody Orders Act, 1991, is under an obligation to provide assistance to the person under the said Act of 1991, for the purpose of being provided with such assistance.”²⁹ Thus the 1991 Act affords more opportunity to an applicant than would otherwise exist. However, legal assistance is not automatic for access applications made under Article 21 of the Hague Convention.

VI. Conclusion

In cases of parental abduction, Ireland has consistently looked to the best interests of the child. This had been the case prior to Ireland becoming a Member State of the Hague Convention. There have been cases in which children have been returned, and others in which children were allowed to stay with the offending party, because the child's best interests lay with that party. Ireland's judiciary has helped to shape the way in which the spirit of the Hague Convention is incorporated into its own laws.

²⁶ REPORT ON CIVIL LEGAL AID IN IRELAND, ch. 3, at 4.

²⁷ No. 32 (1995).

²⁸ *Id.* § 28.

²⁹ *Id.* § 28 (5) (b).

The most recent statistics on how Ireland has dealt with cases arising under the Hague Convention are from 2002.³⁰ The Minister for Justice, Equality, and Law Reform compiled and released the statistics. In 2002, there were 72 cases involving 112 children, which was an increase of seven cases from the previous year. The Central Authority dealt with 93 cases total (including 21 cases held over from the previous year). Of those cases, 51 deal with abductions into Ireland from other countries, and 42 dealt with abductions from Ireland into other countries.

Of the abductions into Ireland, ten cases resulted in an order to return the children; three cases resulted in a refusal by the Court to return a child. In fourteen cases the children were returned voluntarily or the parties reached an agreement. Nine applications were withdrawn; two access orders were registered, and thirteen cases awaited resolution at the end of the year.

Of the abductions from Ireland, in eight cases foreign courts ordered the return of the children; in two cases foreign courts refused the return. In nine cases the children were returned voluntarily or the parties reached an agreement. Seven applications were withdrawn, and thirteen cases awaited resolution at the end of the year.

Of these cases, 65% involved the United Kingdom, 10% involved the remaining European Union Member States, 9% concerned the United States, and 16% involved other contracting states.

Although each year there are cases awaiting resolution, most cases in Ireland are resolved. Ireland's domestic legislation implementing the Hague Convention, domestic legislation regarding child abduction, its court system and structure for handling child abduction cases, the law enforcement system in place to handle these incidents, and legal aid available to assist applicants are all set up to meet the goals of the Hague Convention.

Prepared by Kersi B. Shroff
Chief, Western Law Division,
and Matthew Nugent
Western Law Division Extern
November 1999

Updated by Kersi B. Shroff
Chief, Western Law Division,
and Diana Frazier Miller
Legal Analyst
December 2003

³⁰ See the Press Release of June 17, 2003 from the "Press Office" available at www.justice.ie.