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I. INTRODUCTION

Each year 350,000 cases of child abduction occur in the United States. Approximately 10,000 of these cases involve the abduction of children to foreign nations by a parent.¹ A swell in divorce rates and ease of international travel are likely factors for this recent phenomenon. The primary legal remedy for parents of children abducted to foreign nations is the Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention”) ratified by the United States on October 25, 1980.² As of July 2001, the treaty was in force between the US and fifty other national signatories.³

The Hague Convention is designed to return children to their “habitual residence” where a court of proper jurisdiction will determine custody. The treaty, however, has been largely ineffective in accomplishing this objective. It has failed to meet its goal in large part because of reliance on an essentially subjective best interest standard that facilitates foreign nations’ manipulation of the treaty and their wrongful retention of foreign children within their borders. The subjectiveness of the best interest standard enables judges to make discretionary decisions. Discretion often takes the form of gender biases, national biases, and judgments regarding the “acclimatization” of children to their environment that is often due to judicial delay. The result is substantive non-compliance with the Hague Convention.

Family courts in the US employ the best interest standard on a daily basis. Fundamentally subjective and ill-defined, the best interest standard is at best

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inconsistently applied by US courts. However, the complications associated with implementing this imprecise standard are magnified at the international level. The development of objective criteria and an international communication network among judges could facilitate the return of children to the proper jurisdiction and custodial parent. Efforts to effect reform in these areas have been made, but thus far none have remedied the problem of non-compliance. Ultimately, the optimal solution may be to remove the loose language from the treaty that facilitates use of a best interest standard and replace it with objective criteria that international courts could consistently apply.

II. THE HAGUE CONVENTION

The Hague Convention is a multilateral treaty, seeking "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return." Despite having ratified the treaty, many nations still do not satisfactorily comply with the procedure established for the return of children.

The return rate of abducted children varies from country to country. While the US returns approximately 90 percent of the children in Hague cases brought in US courts, Germany's rate of return is particularly low, at about 39 percent. The failure of this treaty is not due to an international conspiracy to retain American children but rather lies in the implementation of a best interest standard at the international judicial level. The US has faced similar problems in its own family courts, where application of the standard is inconsistent across jurisdictions. Although the best interest standard has been adopted by many US states through legislation, it has largely been implemented according to the discretion of judges, who may rely on as many as ten major factors and forty-three sub-factors in their decisions.

Although developing a set of objective criteria and a strong international communication network among judges might promote greater uniformity in implementation of the treaty, the continued low return rate from the same non-compliant nations raises important issues. Either the efforts at consistency must become more vigilant, or, more likely, the treaty language that facilitates use of a best interest standard should be removed altogether from the treaty to close the loophole that, in effect, supports substantive non-compliance through judicial discretion.

Nations that currently capitalize on the treaty’s loophole would likely consent to the change in order to deter the potential non-compliance of other nations at their expense. Change is required to safeguard against widespread non-compliance that could lead to the demise of the treaty.

III. PROCEDURE

Courts essentially have applied a two-pronged procedure to ascertain the jurisdiction in which the custody determination should be made.

First, the courts consider whether removal of the child by the parent constitutes a wrongful removal. Removal qualifies as wrongful if it breaches the custody rights of a person or institution under the law of the State where the child was habitually resident prior to removal and if those rights were exercised or would have been exercised but for removal. The treaty fails to define the term “habitually resident” in order to allow a fact-specific inquiry to determine the proper jurisdiction for the custody hearing. Thus, courts look to certain factors relevant to the determination of habitual residence. These factors focus on a child’s experience, such as his or her schooling.

Second, the courts determine whether returning the child would pose “a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” Forum courts have frequently invoked this article to liberally apply a subjective best interest standard.

IV. REFORM EFFORTS

On October 19, 1996, delegates of the thirty-five Member States of the Hague Conference drafted the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, as an international effort to reform the system in place. The drafters included an explicit best interest standard in the treaty language that presumably could not remedy the problems associated with the Hague Convention. An explanatory note indicates that “the intervention of public policy should take into account the best interests of the child, which principle moreover
should inspire the application of all the articles of the Convention." However, whether implicit or explicit, the best interest standard is highly problematic at the international level. To date, three nations have ratified this Convention.

Four special commissions have been launched by the Permanent Bureau of the Hague Convention to review the operation of the treaty in member nations. Most of the signatories to the treaty attended the recent meeting of the commission in March 2001. Representatives advocated increased judicial communication and training and encouraged the publication of a practice guide for judges who deal with Hague cases. The US State Department has facilitated communication through international conferences in which judges discuss current judicial practices under the Hague Convention and propose reforms for the judicial systems currently in place. Such conferences are important events in emphasizing mutual understanding, respect and trust between the judges from different countries—factors which are essential to the effective operation of international instruments concerned with the protection of children, and in particular, the Hague Child Abduction Convention. However, only six nations participated in the September 2000 conference. The Permanent Bureau has also led three judicial seminars, in part to facilitate consistent judicial practices across jurisdictions, but judges from only seven member jurisdictions attended the most recent seminar in October 2001.

The International Child Abduction Database ("INCADAT") was established on May 9, 2000 to post recent Hague decisions on the Internet. This site was created by the Permanent Bureau to inform judges and others involved in Hague cases about the current state of Hague Convention case law in order to promote greater

15. Id.
16. Id.
19. Id.
consistency in court rulings. However, this attempt at reform has been insufficient thus far because not all nations have contributed information to this database.

These unsuccessful attempts to attain consistency across jurisdictions indicate that closing the best interest standard loophole may be the only effective method by which to remedy substantial non-compliance. Although facilitating judicial communication and formulating clear standards of application help cure ignorance of the law, these remedies cannot combat willful non-compliance. This is true in large part because only explicit treaty provisions are binding on member nations; judicial precedents and how-to guides are merely instructive and therefore can be ignored altogether.

V. THE PROBLEMS WITH BEST INTEREST

The loopholes in the treaty’s language give judges great freedom in enforcement. There are several possible explanations for low return rates other than poor law enforcement, namely, acclimatization of children due to judicial delays, and gender and national biases.

A. CHILD’S NEW HOME

In nations where courts delay proceedings and are particularly slow to hear Hague Convention cases, judges may use their discretion to retain children in a foreign jurisdiction. Judges, applying a best interest standard, may find that children have become attached to their new environment and should, as a result, remain there for the duration of the custodial hearings. For example, the courts in Austria, a nation notorious for non-compliance with the Hague Convention, have found that delays in a case have caused a child to become settled in Austria, such that a forced return to the US would cause the child psychological damage. Despite reforms in the German court system, including the implementation of special training for judges handling cases under the treaty and the designation of specific courts to handle these cases in larger districts to expedite the process, the German return rate remains low. Little empirical data exists showing the effects of these recent reforms on the German return rate, but US Senate records indicate that Germany has made essentially no progress.

on open cases.26 The centralization of venue may facilitate more consistent application of treaty standards. However, consistently biased decisions may continue to be rendered.

B. GENDER BIAS

The legal costs incurred by petitioning parents in Hague Convention cases can be extremely high.27 Women, in many countries, receive significantly lower wages than men. The odds of obtaining custody of their children may be stacked against mothers in many countries as a result of the inability to afford the litigation.

Although the treaty was intended to deal with the problem of non-custodial fathers’ abduction of their children, mothers are now responsible for about 70 percent of abductions. Swedish courts notoriously favor Swedish non-custodial mothers over non-Swedish custodial fathers living outside of Sweden.28 Here, the gender bias may be compounded by national bias.

After a large increase in the number of female abductors, the UK and Australia began to apply “undertakings” in Hague cases. Undertakings, or conditions for return, inherently discriminate against the male petitioning parent.29 Some courts have forced fathers to pay for the airfare of the female abductor returning the child, finance the abductor’s legal fees, and even drop criminal charges.30

One particularly striking situation of gender bias is the Hague Convention case of O’Donohue v O’Donohue, in which a mother abducted and the father re-abducted their children.31 Although the UK refused to hear the case, it imprisoned the father while he awaited extradition to Sweden, and not only paid for the mother’s travel expenses, but returned the children to her while the case was pending. In the case of Lebeau v Lebeau, UK officials never even detained a mother awaiting extradition to the US, though her behavior was far more egregious than that of the father in O’Donohue.32

C. NATIONAL BIAS

National bias may also motivate a judge’s decision regarding a child’s best interest. Among signatories to the Hague Convention, Sweden is among the least compliant.33 Swedish courts favor mothers to fathers and Swedes to non-Swedes

29. Id at 169.
30. Id at 170.
31. Id at 170–71.
32. See id at 171.
33. See id at 133.
through employment of the subjective best interest standard. Germany has also been
accused of favoring the custody applications of its own citizens. The best interest
standard allows biases to impede the rightful return of children.

VI. CONCLUSION

Differences in culture and difficulty divorcing national pride from judicial
decisions complicate the application of a best interest standard, beyond the difficulties
admittedly experienced in US courts. Unfortunately, international child abduction
cases will not disappear; as divorce rates rise, so too do custody and kidnapping issues.
The low rate of return of children unlawfully taken to or detained in a foreign country
must therefore be addressed. Beyond piecemeal procedural reforms, significant
changes must be made in the treaty’s language to ensure progress in this area.
Reforms thus far have been aimed at defining standards more clearly and increasing
judicial awareness of acceptable procedures to be undertaken in Hague cases.
However, little has been done to address the more active non-compliance among
countries that apply the best interest standard in a biased fashion. Loose treaty
language must either be wholly removed or more clearly defined within the treaty
itself, with the establishment of more extensive international judicial networks to
safeguard custody rights in international disputes. Otherwise, judicial decisions will
continue to be motivated by gender and national biases and affected by judicial delays.

It does not appear that there are any serious proposals to remove this
problematic language from the treaty. In fact, the 1996 Convention seems to indicate
that the international effort at reform may be heading in the wrong direction.
Attempts to devise clear language to be applied by all judges in Hague Convention
cases have been made, in the form of seminars and commissions attended by judges
from the various national delegations. However, the treaty still does not possess an
objective best interest standard, a standard that would be in the best interest of the
children involved.

34. See Bureau of Consular Affairs, Report on Compliance with the Hague Convention on the Civil Aspects of

35. Interestingly, the recent case of Elian Gonzalez illustrates how the US court system, even where the
Hague Convention is not implicated, is apparently able to divorce itself from a national bias to
consider the best interest of the child and return him to his legal guardian.