

# P E N N S Y L V A N I A LAW WEEKLY

## **International Intrigue**

*A treaty creates remedies for child abduction*

By Dorothy K. Phillips  
Special to the Law Weekly

Most family law practitioners handling custody matters are familiar with the Pennsylvania adoption of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) 23 Pa. C.S. Section 5401 et seq. They may be familiar with the federal statute, the Parental Kidnaping Prevention Act (PKPA), 28 U.S. C. Section 1738 A, governing courts within the United States and its territories. However, in these times of easy air travel, it is important for family law practitioners to be familiar with the international treaty governing the appropriate forum for a determination of a child's habitual residence.

The United States has signed on to the Hague Convention, formally known as the Convention on the Civil Aspects of International Child Abduction, a treaty on parental kidnapping. The treaty dates to October 1980 and as of Oct. 17 this year, there were 56 signatories.

The purpose of Uniform Acts within the United States is to achieve uniformity of laws and the enforcement of those laws. In the same way, the Hague Convention promotes uniformity among the signatories with regard to wrongful removal or retention of children internationally. The stated purpose of the Hague Convention is to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.â€ˆ Hague Convention Preamble, 19 I.L.M. 1501 (1980).

In short, the Hague Convention provides that if a country or state makes a custody order in the forum where the child is physically located, such an order does not prevail if as a result of a Hague Convention proceeding, a court rules that the child's habitual residence is in the country or state from which the child has been removed. See Articles 16 and 17 at 1503. As an example, if Pennsylvania were to conduct a custody hearing concerning a child who had been removed from Canada (a signatory), and decided the custody issue, that order would not prevail over a decision rendered by a Canadian court pursuant to a Hague Convention petition which ruled that the child's habitual residence was in Canada and not in the United States.

In a recent case before the 3rd Circuit U.S. Court of Appeals, *Tsai-Yi Yang v. Fu-Chiang Tsui*, 415 F.3d 199 (3d Cir. 2005), Tsai-Yi Yang, the mother, and Fu-Chiang Tsui, the father, had one child. Yang was a resident of British Columbia, Canada and Tsui a resident of Pittsburgh, Pennsylvania. The Pittsburgh court awarded custody to the father and the court in British Columbia awarded custody to the mother. The mother was not successful in securing a voluntary

# P E N N S Y L V A N I A LAW WEEKLY

return of the child and therefore filed a petition in federal court for the Western District of Pennsylvania under the Hague Convention's implementing statute, 42 U.S. Section 11601, et seq. (2004), also known as International Child Abduction Remedies Act (ICARA). The district court abstained from considering the mother's petition and denied her motion to stay custody proceedings as moot. The mother filed an appeal at the 3<sup>rd</sup> Circuit, which reversed the district court's ruling in a case of first impression.

The issue whether a District Court should abstain from a Hague Convention Petition when a State Court Custody proceeding is pending is an issue of first impression in this Court, the court said.

## **Abstention Doctrine**

Citing the abstention doctrine stated in *Younger v. Harris*, 401 U.S. 37 (1971), the court was called upon to decide whether the federal court should abstain when there is an ongoing state judicial proceeding. The *Yang* court, after examining existing law from other circuits concerning whether a federal court should abstain when there is an existing state court proceeding, determined that in a situation where there is a pending custody proceeding in the state court and a petition is filed in the federal court under the Hague Convention, but the Hague Convention has not been raised, or it has been raised but not litigated in the state court, the federal court has generally found that abstention is not appropriate. That same court determined that where a Hague Convention petition has been raised and litigated in the state court, abstention by the federal court is generally appropriate.

The *Yang* court stated as follows: "Custody litigation in state court revolves around findings regarding the best interest of the child, relying on the domestic relations law of the state court. An adjudication of a Hague Convention Petition focuses on findings of where the child was habitually located and whether one parent wrongfully removed or retained the child."

It continued: "The Hague Convention proceedings can in fact be held in either state or federal court. ICARA vests concurrent jurisdiction over Hague Convention Petitions in both court systems."

Therefore, a petitioner is free to bring a Hague Convention proceeding in a state court custody proceeding. The petitioner is free to choose between state and federal court. When a Hague Convention matter is filed in federal court however, the state court custody litigation must be stayed pending the outcome of the Hague Convention proceeding. 19 I.L.M. at 1503.

The 3<sup>rd</sup> Circuit decided that when a custody proceeding is filed in state court and a Hague Convention petition is filed alleging wrongful retention in federal court, it is the custody proceeding in state court that must be stayed. That court held that since Congress bestowed concurrent jurisdiction on state and federal courts, Yang's petition filed in federal court was proper because she did not choose to file it in state court. The court further held that it would not be appropriate to apply the *Younger* abstention to deprive the petitioner of the specific grant of jurisdiction of federal court, which she elected to exercise. The 3<sup>rd</sup> Circuit held that Yang's

# P E N N S Y L V A N I A LAW WEEKLY

petition should have been considered by the district court, and that its dismissal as moot of Yang's motion to stay was error. Because Yang did not raise her Hague Convention claim in state court and because Hague Convention and custody determinations are separate and distinct legal issues, the district court should have heard Yang's petition and should not have dismissed her motion to stay the state court proceeding.

In this age of great mobility, it is not uncommon for a child to be removed from one country and brought to another country. If the family law practitioner files for custody in a state court proceeding after a child has been brought to the United States from another country, and assuming the UCCJEA residency or other requirements are met for the state court to exercise jurisdiction in a custody matter, that practitioner is wise to also file a Hague Convention petition in that state court. The purpose of the petition is for that court to determine that the child's habitual residence is in Pennsylvania. While a state court has jurisdiction to decide a Hague Convention petition as well as a custody petition, a federal court cannot hear custody, a matter reserved to the states. If the parent does not file a Hague Convention petition at the same time as she or he files for custody, the attorney takes a chance that the other parent in a country which is a signatory to the Hague Convention will file there or in the local federal court for a determination of the child's habitual residence.

Such multiple filings can become financially prohibitive requiring both parents to bankroll litigation in at least two different forums. It is therefore the wise practitioner who knows that there is concurrent jurisdiction for Hague Convention purposes in state and federal court and who will consolidate both matters. In *Yang*, since the parent who filed in state court the father did not raise the Hague Convention issues, the mother was free to do so in the federal court. In a situation such as that, legal fees continue to mount because each parent is supporting two different litigations, one for custody in state court and one for Hague Convention purposes in federal court. The attorney should file both matters in state court under one roof so as to avoid the financially prohibitive costs of two or even three ongoing litigations in one state or possibly in two countries.

The purpose of this international treaty is to protect children. Multiple litigations in different forums can defeat achieving that goal. Proper handling of the intricacies of the international

*For more information contact Dorothy K. Phillips, Esq at (215) 568-7757.*