

Developments in Child Law International child abductions 1 February 2008

In this week's update we take a look at the issue of international child abductions which is governed by the Hague Convention on the Civil Aspects of International Child Abduction. This Convention was incorporated in South African law through the enactment of Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996. However, once the Children's Act 38 of 2005 comes into full operation the Hague Convention Act will be repealed entirely and international abductions will then be dealt with in terms of Chapter 17 of the Children's Act.

The issue of international abductions is of relevance for practitioners at Justice Centres as the abducting parent is often represented by the Legal Aid Board and there have also been instances where the abducted child required separate legal representation which was provided by the Legal Aid Board. It is further relevant for the future as section 279 of the Children's Act requires that a child concerned in a Hague Convention matter must always have separate legal representation provided by the Legal Aid Board.

See attached update for brief summaries of recent Hague Abduction judgments. Please note that should you have any difficulty in finding the sources mentioned in this document (or any other update), do not hesitate to call us and we will be happy to assist in that regard.

CASE LAW

Central Authority v Houwert [2007] JOL 20032 (SCA) concerns the parental abduction of a young boy from the Netherlands by his mother and is an application from the Central Authority of South Africa (the Family Advocate) for the return of the child to the Netherlands. Return applications of this nature are governed by the Hague Convention on the Civil Aspects of International Child Abduction. The Hague Abduction Convention stipulates that a child who has been removed from his/her country of habitual residence in breach of another parent's custody rights must be promptly returned to the country of habitual residence, preferably within 6 weeks. An application under the Hague Abduction Convention may not decide issues relating to the best interest of the child, custody or access. The objects of the Hague Abduction Convention are firstly that the child must be returned to the country of habitual residence who is best placed to decide custody and access matters; secondly prompt return is in the best interest of the child as it will limit any disruption and trauma experienced by the child as a result of the abduction. The court in the country where the child has been removed to does not have discretion and must return the child

unless the abducting parent can prove one of the exceptions to return stipulated in the Hague Abduction Convention.

The **Houwert** matter is exceptional because the matter only reached the SCA after a period of three and a half years had passed since the abduction. The abduction occurred in September 2003 and judgement in the High Court was handed down in June 2005. Van Heerden AJ in **Houwert** upheld the principles of the Hague Abduction Convention and ordered the return of the child despite the long delay. Van Heerden AJ strongly spoke out against the systemic delays that plagued the matter, particularly delay caused by the Family Advocate's office as delay negates the objects of the Hague Abduction Convention. She urges practitioners, officials and presiding officers at all stages of a Hague Abduction matter to bear in mind that speed is of the utmost importance and that ideally these matters should be finalised within 6 weeks. The Houwert judgment is attached.

In another Hague Abduction matter heard in the Eastern Cape, **Family Advocate v B [2007] 1 All SA 602 (SE)**, the matter was heard on 19 October 2006 and judgment was given on 20 October 2006. In this matter the judge did not return the child based on the exception set out in the Hague Abduction Convention that the child does not have to be returned if there is a grave risk that the child's return will expose him/her to physical or psychological harm or otherwise place the child in an intolerable situation. Although this judgment may be criticized for not upholding the stringent test for "grave risk" as set out in the definitive cases on the Hague Abduction Convention, **Sonderup v Tondelli 2001 (1) SA 1171 (CC)**; **[2001] 2 BCLR 152 (CC)** and **Pennello v Pennello 2004 (3) SA 117 (SCA)**; **[2004] 1 All SA 32 (SCA)**, it does have interesting aspects in that the judge appoints a curator ad litem for the child and takes the child's views and opinions into account.

In the case of **Family Advocate Port Elizabeth v Hide [2007] 3 All SA 248 (SE)** the court upheld the high threshold to establish that there is a "grave risk" of physical or psychological harm in order to refuse return. This matter highlights the importance of mirror orders or undertakings as provided for in the Hague Abduction Convention. This mechanism allows the South African courts to set conditions for the return of the child in the court's final order which must be made an order of court in the country to which the child is being returned. It allows the South African court to protect the abducting parent and the child from some negative aspects of return such as providing accommodation and preventing criminal prosecution.

On 28 February 2008 the SCA will hear the matter of S v H which is also a Hague Abduction matter where the court will look at custody rights of unmarried fathers in light of the Children's Act and the Convention as well as the issue of a Court's right of custody for the purposes of the Convention. Note this is an appeal from the CPD decided in 2006. See **S v H 2007 (3) SA 330 (C)**.

Regards