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Missing Links in International Child Visitation Law: Joint Custody and Due Process

by June Edverson, Esq.

In our growing global village, love continues to cross national borders, bringing with it children, long-distance visitation and custodial crises. Enter the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention"), which also covers the problem of the non-custodial parent's "access" to the child. The usual problem is in securing cooperation on visitation from the custodial parent, a problem recently called "as difficult as it is urgent and important." <sup>1</sup>

As more nations join both the Convention and the Rights of the Child Treaty, the tandem concerns of due process and custody of the child bare their international baby teeth. In a recent case involving a Norwegian mother and American father, these issues were found to be difficult to raise, both administratively and judicially, in part because the Convention itself fails to contemplate them in a more effectively global and jurisdictional way, and in part due to the natural reticence of Member nations to enforce against their own. <sup>2</sup> The Norwegian case exhibited the same lapses in enforceable activity as other international jurisdictions, thus robbing the Convention of its effectiveness and pointing to the need for practitioners to press for further development. I suggest that the Convention's access goals are better reached by focusing on custody and due process concerns.

Interference with visitation as a ground for modification of custody offers an opportunity to level the playing field. The Norwegian Child Law includes such a provision, as well as the "right" of the non-custodial parent to visitation. Specifically, in a case where the custodial parent hinders visitation, the non-custodial parent "can demand a new custody order as to who shall have custody or who the child shall live with." <sup>3</sup> The Norwegian court did not reach the issue on the merits. Unfortunately, this case resulted in an agreed visitation order nearly forced on the father, and a best interests of the child analysis that looked surprisingly like the mother's delaying but preferred travel calendar.

In general, due process standards vary by nation, and are variably applied. Thus, in Member states, a custody cause of action's separation from the

visitation case brought in a Hague Convention suit for access is not just an inconvenience, but a four-lane highway for obfuscation of the international law's goals and objectives.

The international law tries to provide more: the Convention includes the supplication – to both administrative and judicial authorities – to "take all appropriate measures" to accomplish its goals. These can include provisional measures, as well as outreach "to make arrangements for organizing or securing the effective exercise of rights of access," a broad perspective found throughout the treaty. <sup>4</sup>

In this example, the U.S. State Department was prompt in its handling of the application submitted on the father's behalf, and the Norwegian Ministry of Justice, in a generous gesture, suggested to the mother in writing that there appeared to be some merit to the father's claim, requesting she contact the father and come to an agreement for visitation. Stillness was then the mother's best friend, and a fjord full of quietitude fell upon the scene. Fall turned into Winter, Winter into Spring and Spring into Summer before the mother was forced to show her hand. The emotional toll was that of the child who loves his father and was used to seeing him regularly, and of the father whose determination and patience were rewarded with little official activity. The lack of any follow-up on the Ministry's orders and the mother's apparent snubbing of the international process were something easily accomplished, but difficult for the Norwegian authorities to confront and respond to. Despite the Norwegian custody law's threat to consider custodial changes for hindered visitation, an option even pointed out by Norway in its international reporting <sup>5</sup>, general due process was impeded, even after filing suit, beyond what would be expected in the U.S. before two preliminary hearings resulted in the 'agreed' visitation order, no consideration of custody, and questionable compliance. As a good American would say, "There oughtta be a better way."

### **The Custody and Due Process Issues**

There would be 'a better way' if the playing field were leveled. Custody holds that potential, not just on the national playing field, but as a lever for international enforcement. The Convention does not consider the merits of the custody determination and, thus, does not guarantee a custody hearing in the case of a non-custodial parent. <sup>6</sup> What is needed is a greater interest in awarding joint custody, and a standard consistent with wrongful retention that would meet U.S. notions of due process under the Uniform Child Custody Jurisdiction Act (UCCJA). <sup>7</sup> Despite U.S. jurisdictional variations in the application of UCCJA standards, nations utilizing these concepts, in addition to their own domestic law, would bring about a greater number of timely and equitable results.

As for due process in our increasingly global village, when the wheels of justice are turning so slowly that the child is growing through important periods without shared parental contact, the rights that should be realized *are not* realized. Yet the custody issue is a scary monster in a country whose own

bad-behaving national is the custodial solace-seeker. It is time to consider that determination more relevant to the international visitation case.

Consider custody the chips. The custodial parent will quite often have custody by default and has a huge pile of chips, while the non-custodial parent has no chips, and must not only fight the good visitation fight, but fight it with one hand tied behind his back, and half-way 'round the world.

While it is fair to admit, as U.S. courts have done, that 'the frustration of visitation alone will not justify a change in custody', <sup>8</sup> a broader conclusion should more often be made. Where other 'values are equal' and the child's paramount right to share time with both parents is considered - either through domestic law or the international Rights of the Child Treaty, the frustration of visitation should rise to the level necessary to obtain an examination not only of the best interests of the child but of the better enforceability of the visitation order within the context of joint custody. Utilizing the custodial battle should, therefore, conceptually, also be a context for achieving better due process on the issue of hindered access.

Practical considerations of real people trying to accomplish real rights, the natural inequality of parties from different countries, and a re-evaluation of the significance of the human rights involved in these cases, scream for the inclusion of the custody connection in the access case, as well as the right of children to more urgent activity to secure due process as a right resulting from the Convention's administrative and judicial exercise.

The role of nationalism, protectionism and xenophobia will continue but must give way, something perhaps only accomplished if the Hague Conference involves itself more fully in developing international legal standards for Convention actions. Certainly, the Convention's access goals are better served by using custody and due process considerations to create a more dramatic, more realistic and more effective composition of the 'access' case.

We've seen an historical shift from due process as a jurisdictional issue to due process as *in rem*.<sup>9</sup> Now, we see due process moving from a procedural right to a human right - in the sense that human rights are often intentionally stymied by the *lack* of it, and not accomplished *without* it. What we should therefore see is a similar shift in international practice to prioritize the child custody issue as a necessary compliance tool of the Hague Convention in 'hindered access' visitation disputes, and increased attention to matters of timeliness in Member states' responses.

Delays of judicial and administrative authorities can be easily disguised as bumbling bureaucracy, and will usually protect the local 'national' to the detriment of both the non-custodial parent's and the child's international legal rights. It is therefore also important to restate the Convention's admonition to take "all appropriate measures" to secure its objectives.

Children are waiting to meet their fathers and mothers. The timeframe for

their development, and the usefulness of accomplishing shared visitation is limited. The stage for the parents' relationship is, more and more, the world. The international procedure must be structured and usable in a way that bridges easily-recognized legal concepts and commonly-found testing hurdles to achieve the goals of the law.

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<sup>1</sup> From Report And Conclusions of the Special Commission Concerning the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 27 September – 1 October, 2002, by the Permanent Bureau, available online.

<sup>2</sup> A good introduction to these issues can now be found at 38 U.C. Davis Law Review 1049 (April, 2005), "Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence," by Linda Silverman.

<sup>3</sup> Norwegian Barneloven, Sec. 43, as amended April, 2004. Translated into English by the author.

<sup>4</sup> Silverman at 38 U.C. Davis Law Review 1080-1085 (April, 2005).

<sup>5</sup> United Nations CRC Convention on the Rights of the Child, 39th Session, Summary Record of the 1037th Meeting, Geneva, 24 May 2005, Consideration of Reports of States Parties, Third Periodic Report of Norway, available online.

<sup>6</sup> On point, but older, 26 Vand. J. Transnat'l L. 865 (November, 1993), "Due Process Rights of Parents and Children in International Child Abductions: An Examination of the Hague Convention and its Exceptions," by Dorothy Carol Daigle.

<sup>7</sup> Ibid. I agree generally with this suggestion, but am not updated on its status, an area for continued work.

<sup>8</sup> An excellent new resource in this area is found at 11 Causes of Action 1 (2006), "Cause of Action for Transfer of Child's Custody Based on Parent's Interference With Visitation Rights," by Kurtis A. Kemper, J.D.

<sup>9</sup> ie: having to do with property distribution.

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