Smith Debnam Free Information on North Carolina Divorce and Family Laws

The Hague Convention and International Child Abduction

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Long known as the standard for the treatment of prisoners of war, The Hague Convention is also the international treaty that serves as the source of ongoing agreement between nations on other issues. One important aspect of the Hague Convention addresses international protocol in the event of a child abduction that crosses national boundaries. The United States ratified this element of The Hague Convention (HC) in 1981, but its provisions came into full effect on July 1, 1988 through enactment of the Federal legislation called the International Child Abduction Remedies Act.

The provisions of the HC accord require that signatory countries take all appropriate measures to carry out the objectives of the HC, and to use the most expedient procedures available in doing so. Whether through the provided administrative process designed to seek a voluntary return, or through legal action in the court system, countries must respond proactively and promptly in the appropriate return of an abducted child.

The HC, and any legal proceedings under it, are not intended to serve as a child custody case in the sense of determining what is in the child's best interests. The objective of the HC, through its focus on an expedient return of the child, is to ensure the child is in the proper place for that determination to be made, as well as prevent the abducting parent from gaining an unfair advantage. The International Child Abduction Remedies Act provides that it and the HC "empower courts in the Untied States to determine only rights under the Convention, and not merits of any underlying child custody claims."

Application of The HC segregates cases into two categories: outgoing cases and incoming cases. Outgoing cases are those in which a party here in the United States wants an abducted child to be returned from another country. Incoming cases are those in which the child was abducted from a foreign country and brought to the United States.

The parent whose child has been abducted obtains an application to seek the return of their child from the U.S. State Department. The applicant does not have to have a court order for custody to be able to seek relief under the HC. The completed application is submitted to what is called the "central authority." Under the HC, each nation must designate its official central authority. Previously, the United States' central authority was the National Center for Missing and Exploited Children, but in April 2008 this was changed to the State Department. The central authority does not charge for its services provided under the HC. The central authority may assist in obtaining pro bono legal counsel or a reduced-fee attorney, but will not pay for any legal fees or expenses incurred by the applicant.
The application is sent to the central authority in the country where the child is believed to be located. In the U.S., the State Department recommends sending all "outgoing" applications to

their office first for a review to ensure compliance with the HC, and they in turn will send it on to the foreign central authority. Applications received by the State Department are assigned a case officer who can furnish information about the foreign country where the child was taken and the legal system there. While they may not act as legal counsel, a case officer can assist in finding a foreign attorney. The case officer works with the representatives from the foreign central authority toward obtaining a prompt and voluntary return of the child.

In "incoming" cases, the objective is to have the abducted child returned to the child's foreign country of residence. The process starts the same as outgoing cases, with an application leading to the respective central authorities for the countries involved trying to work out voluntary return of the child.

If the efforts of the central authority fail to produce a voluntary return, then parents may resort to legal proceedings. In the U.S., legal proceedings for an "incoming" case can be filed in state or Federal court. If the court determines that a child was wrongfully removed to or retained in a country, then the court must order the immediate return of the child. Under the HC rules, to establish that the removal or retention was wrongful, the parent bringing the case must prove that the child was a habitual resident of the country where the parent wants the child returned, that the removal or retention was in breach of custody rights of that country's law, and that the parent bringing the case was actually exercising those custody rights at the time of the removal or retention.

The HC recognizes that custody rights may arise by operation of law, by court decision, or agreement. The parent bringing the case must not only have custody rights but must be exercising them prior to the removal or retention. This will not typically prove to be a difficult hurdle, however, as under the HC, that person cannot have failed to exercise those custodial rights short of acts that constitute clear abandonment of the child.

Defenses in opposition to the child's return are available, although limited. The defending parent can assert that the parent bringing the case consented to the removal or retention, or that the parent bringing the case was not actually exercising custody at the time of the removal or retention. They may also attempt to demonstrate that the child objects to the return, being relevant if the child is deemed by the court to be old enough and mature enough for the court to consider the child's objection.

Failure to timely file a HC action may give rise to an additional defense -- if the case is filed one year or more after the date of the wrongful removal or retention, a possible defense against the return of the child is to demonstrate that the child is now settled in their new environment. In addition, a defense may be argued on grounds of general public policy which provides that the return of the child may be refused if doing so would not be permitted by principles protecting human rights and fundamental freedom in the country where the child is located.

Should an instance of international child abduction occur, we recommend that qualified legal counsel be consulted to assist in taking action under the provisions of the Hague Convention and associated federal law.

Beware Of Interference With A Marriage Under North Carolina Law

May 1, 2007

When a marriage ends, the emotional and economic impact on both spouses is immeasurable. According to a study conducted twenty years ago that compared stressful life events, the greatest personal stressor is the death of a child or a spouse. The next greatest stressor is the breakup of a marriage, determined to be more stressful than the loss of a job, the death of a parent, or the process of building a home. The stress of dealing with a broken marriage is often quite severe and can be aggravated when a third party is involved in the breakup. Don't deal with divorce alone, call a Raleigh divorce lawyer.

North Carolina is one of only five states that still allow, without limitation, the claims of alienation of affection and criminal conversation. These legal claims arise when a third party interferes with a marital relationship, typically by tempting a spouse into an extramarital affair. For example, when a wife develops a romantic relationship with someone at work and that relationship results in the breakup of her marriage, her husband may be able to sue for damages against the man with whom she had the affair.

Over the past ten years or so, these claims have generated a lot of publicity. Verdicts have been entered in excess of a million dollars in a few cases in which aggravated conduct by the offending party was involved. But there have also been verdicts rendered on similar claims in amounts of about five thousand dollars here in Wake County. It is nearly impossible to predict what a jury will decide in this type of case.

The concepts of alienation of affection and criminal conversation arise out of our English common law. At one time in history a man's wife was considered his property. When another individual took his property, the husband was allowed to file suit and seek damages against that person. During the nineteenth century, people became more enlightened and the law was expanded to permit a wife to bring a similar action against someone who took her husband. By the late twentieth century, many states had eliminated these claims by either legislative or judicial action. As of 2004, 46 states and the District of Columbia had abolished or severely limited the alienation tort and 43 states and the District of Columbia had abolished the tort of criminal conversation.

There are many unsuspecting people who have moved to North Carolina in the last twenty years who have found themselves in the middle of litigation simply because they began a relationship with someone who was separated from their spouse, but not yet divorced. This is the most commonly violated element of the tort of criminal conversation. A person who begins a sexual relationship with a separated but not divorced person can be accused of criminal conversation, even when the new relationship did not begin until after the spouses had separated. Some states have eliminated this claim but have retained the claim of alienation of affection, which focuses on conduct prior to the marital breakup.

Many in North Carolina favor keeping these claims, despite our state's minority position. It has been argued forcefully that a marriage is the most solemn and personal covenant a person can

enter into, and when someone interferes with that covenant it is only right to allow the person who is harmed to seek a judicial remedy. It has been argued that intruding third parties can in fact break up good marriages. It has further been argued that abolishing these torts will have the effect of legalizing adultery in North Carolina, and that no other legal remedy exists by which an aggrieved spouse may seek justice against someone who has intruded into and broken up their marriage.

On the other hand, many family lawyers feel that lawsuits for alienation of affection and criminal conversation are frequently brought simply to gain leverage in a domestic property and alimony negotiation between the husband and wife in their divorce proceeding. It has been argued strenuously that these claims do not protect marriages. Opponents of these laws point to statistics that show that only one of the 25 states with the lowest divorce rates in the United States have retained unlimited alienation of affections and criminal conversation claims. Conversely, the other four states that have retained the claims are in the top half of the states with the highest divorce rates.

In recent years, more and more of these claims have been brought not only against the individual who allegedly broke up the marriage, but also against businesses where the offending relationship arose. In at least a handful of North Carolina cases, employers such as banks, medical practices, and law firms have been sued as defendants in alienation of affection and criminal conversation actions when an employee was accused of breaking up a marriage. To date, all of these employer defendants have been dismissed from the pending cases prior to trial. It is worth noting, however, that the Mississippi Supreme Court recently reversed the dismissal of an employer medical practice from a lawsuit in which alienation of affection and criminal conversation were alleged, ruling that the case should go to trial with regard to the claims against both the employer and the individual physician defendant.

Recently, the North Carolina Bar Association, through the work of the Family Law Section, has submitted a proposed bill to the North Carolina General Assembly that would serve to abolish claims for alienation of affection and criminal conversation. Similar legislation has been proposed several times in the past. In 2004, the House of Representatives approved a similar bill, but it did not pass the Senate. It is the hope of the North Carolina Bar Association's Family Law Section that the abolishment of these claims will become law and that North Carolina will join the overwhelming majority of other states that have determined that such claims are outdated and no longer serve a useful purpose.

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Custody and Visitation - Grandparents v. Parents

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Raleigh divorce attorneys and family law attorneys are seeing an increasing number of grandparents seeking visitation and custody with their grandchildren through the court system. Grandparents' concerns have been heightened by the U.S. Supreme Court decision in June that strengthened the rights of parents. In that case, a Washington state judge had awarded the parents of the deceased father regular weekend visits with their grandchildren. The Supreme Court overruled that decision and stated that under the Constitution, a state cannot be permitted to infringe on the fundamental rights of the parents to make child-rearing decisions.

There is a strong presumption that a fit parent will act in the best interests of his or her child, and that includes making decisions about the degree of contact a child may have with anyone, including a grandparent. However, this presumption can be overcome in cases involving abuse, neglect, unfitness, or where a parent has acted inconsistently with his or her parental obligation. A judge must respect the parents' fundamental right to make decisions concerning the care, custody and control over their children; at the same time, a judge's decision must reflect what is in the best interest of the child. In North Carolina, there are four statutes that allow a grandparent to file an action for custody or visitation:

1. **N.C.Gen.Stat.S50-13.2(b1)** permits a grandparent to intervene in an ongoing custody dispute and request visitation with a grandchild.
2. **N.C.Gen.StatS50-13.5(j)** allows a grandparent to petition for custody or visitation due to changed circumstances in those cases where custody has previously been terminated. In one case, grandparents were allowed to intervene when their visitation rights were arbitrarily terminated by the natural mother after the grandparents had established a continuing, substantial relationship with their grandchildren after an earlier custody order.
3. **N.C.Gen.Stat.S50-13.2A** permits a biological grandparent to file an action for visitation where the minor child has been adopted by a stepparent or relative of the child. To allow visitation where the minor child has been adopted by a stepparent or relative of the child. To allow visitation under this statute, the court must determine that a substantial relationship exists between the grandparent and the child, and that the visitation is in the best interest of the child. This statute is applicable only when the grandparents' biological child's rights have been terminated through a stepparent adoption, not if they were terminated in juvenile court or when the child is adopted by a non-family member.
4. **N.C.Gen.Stat.S50-13.1(a)** permits any parent, relative or other person, agency, organization or institution claiming the right to custody of a minor child to institute an action for custody. Although broadly worded, this statute does not give grandparents the right to file an action for visitation if there is no ongoing custody dispute between the parents and where the grandchild is living in an intact family (which includes a single parent living with his or her child and a natural parent married to a stepparent living with the child). Again, judges must give weight to the presumption in favor of the parents, so a grandparent seeking visitation or custody under this statute must prove that the parent has

abandoned the child, was abusing or neglecting the child, or that the parent was otherwise unfit and not acting in the best interest of the child.

An important factor in either custody or visitation cases involving grandparents is the grandparents' level of involvement with their grandchildren, both before and after a divorce. Custody disputes can be traumatic for children who are put the in the middle of a chaotic battle between their parents. Often, grandparents provide the stable nurturing children need as they learn to adjust to their parents living in separate households. This is especially true when the grandparents have had an ongoing close relationship with their grandchildren. Under the law, however, the presumption in favor or parental rights is strong and the courts will interfere with that right only in limited circumstances. Grandparents who have strong relationships with their grandchildren and their grandchildren's parents are more likely to continue having access to their grandchildren and to be a continuing influence in their lives.