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Offer by ex-parent to take child out of country requires caution

FRONT LINES OF FAMILY LAW

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Family courts are now facing more cases where a foreign-born parent wants to take a minor child out of the United States, be it for a vacation, to attend an overseas life event or permanently. Often the traveling parent is willing to enter into an "agreed order" establishing the ground rules for the travel. Not that simple.

In the practice of international child custody matters, an ounce of prevention is not worth a pound of cure. It is worth a megaton.

The following are general points one must understand before addressing a minor child traveling out of the United States, especially with a foreign-born parent:

1. Understand the risk factors for failure to return. Does the parent requesting leave to take the child out of the country have stronger familial, financial, emotional or cultural ties to another country than the United States?

Does the parent have a history of domestic violence, stalking or child abuse or neglect or failure to follow a child-custody determination or allocation judgment? These are just some of the myriad factors the court should be asked to balance and consider.

Often, the child's grandparents push (and finance) the abduction or wrongful retention of your client's child. Is your client's child the only grandchild on one or both sides of the family?

In a well-publicized case I handled several years ago, my client's in-laws were understood to have spent, albeit unsuccessfully, many hundreds of thousands of dollars of their retirement savings to keep their only grandchild from returning to my client in Ireland.

This, although after prolonged proceedings in Ireland (that the mother had participated in), the Irish court had ordered the child be raised in Ireland.

2. Depending on the destination foreign country, a stateside court order may have no weight or effect in that country. The departing parent can "agree" to everything, but, unless and until properly homologated or registered by overseas counsel, when possible, the stateside decree on its own, may not be worth the paper it is written on.

This includes "agreements" on visitation and continued contact if a permanent removal order is entered. In any event, any order or decree must recite jurisdictional language, and for Hague signatory countries (based on The Hague Convention on the Civil Aspects of International Child Abduction), it must also delineate Hague factors so there is no factual dispute that the United States is the child's habitual residence.

3. "Mirror orders" are often illusory and difficult to craft. Often, a stateside generated custody order contains provisions that run contrary to the destination country's statutes or public policy. For instance, Japan's legal system does not recognize shared parenting after divorce. Sharia law, followed in many Middle Eastern countries, also has specific rules for which parent a child should be raised with. They favor the mother during the "tender years."

4. An international treaty may be meaningless. That a child is going to a country that is a signatory to The Hague Convention, commonly called The Hague, is not an insurance policy that the child will ever be returned to the United States.

Familiarization with the U.S. State Department's annual Report on Compliance with the Hague Convention is essential, especially for the party resisting travel or removal of the minor child to a foreign country.

The State Department's latest report (for 2018) lists the following as noncomplying countries: Argentina, Bahamas, Brazil, China, India, Dominican Republic, Ecuador, India, Japan, Jordan, Morocco, Peru and the United Arab Emirates.

For example, Japan recently became a signatory to The Hague. But the chances are slim to none that a child taken to Japan by at least one parent of Japanese ancestry will ever be returned.

The Japanese legal system has no coercive system to enforce court orders. There is no Japanese equivalent to our contempt proceedings, especially in family matters.

Even if, on the rare occasion, a "return order" (the goal of bringing a proceeding under the convention) is entered by the Japanese courts, and the even rarer occasion that such an order remains intact under the Japanese appellate system, the offending parent may ignore it — with impunity.

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5. That a child is a U.S. citizen is also no insurance policy of his or her return. In international custody matters, more often than not, blood trumps citizenship. Often, it is likely that the child also has a passport from the traveling parent's country of birth, or may obtain one.

With any rules, there are exceptions. In certain countries, a custody order generated stateside could be registered and enforced in the foreign country. A parent in violation could also be in contempt stateside and picked up on a body-attachment, or detained through Interpol, if he or she ever leaves the foreign country to, say, take the children to Disney World in Orlando, Fla.

Working to get the return of a wrongfully removed or retained child from a foreign country takes a tremendous toll on the parent left behind, both financially and emotionally.

It also takes an emotional toll on the child. Also, as with any litigation, there is never a guarantee of success. The decision makers should not take a minor child's foreign travel lightly, nor equate it with a child traveling to another state.

— A future column will suggest safeguards that can be put in place should international travel or removal of a minor child appear inevitable.