

Cross border custody and the left behind parent

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In a multi-cultural, multi-ethnic society like Australia, the biggest concern for most parents following separation (or even during a relationship when it is strained) is that one parent ('the travelling parent') might take the child overseas on a medium to long-term basis and therefore deny the child the right to spend time with the other parent ('the left behind parent').

This is particularly a concern when one parent is a citizen of a foreign country or has strong links to a foreign country (such as family and the ability to obtain a job overseas). It is inadvisable to wait until the child has been taken overseas with the hope that they will be 'returned' although it is possible in some cases to have a child returned pursuant to The Hague Convention on the Civil Aspects of International Child Abduction ('the Hague Convention').

However, this is a long process and one that can be emotionally draining for the left behind parent. More importantly, it can also be an emotionally traumatic process for the child as well.

If you have any concerns around these issues, it is much better to be on the front foot and prevent your child leaving Australia than trying to get them returned.

How do I stop my child being taken overseas?

Preventing a child from going overseas with a parent is always the safest approach if there is a risk they will not return. A parent with a concern that their child may be removed from the Commonwealth of Australia should immediately contact their lawyer. To prevent a child going overseas, an application can be made to the Court seeking that the child be placed on the 'Family Law Watchlist' ('the Watchlist'), previously known as the 'Airport Watchlist'.

To do this, your lawyer will prepare an Initiating Application and an Affidavit and file it with the Federal Circuit Court or the Family Court. As soon as the documents are filed your lawyer will also complete the Family Law Watchlist Request Form available on the Australian Federal Police ('AFP') website and provide the form, together with the filed documents to the AFP. The AFP will then immediately place the child on the Watchlist.

The left behind parent does not need to wait for a Court order before a child is placed on the Watchlist. The child is placed on the Watchlist as soon as the filed documents are provided to the AFP.

If the travelling parent attempts to remove from Australia a child whose name is on the Watchlist, an alert will be activated on the computers at the Department of Immigration and Border Protection. The AFP will then detain the child and the travelling parent while they run the appropriate checks. The AFP will also contact the left behind parent to attend the airport and pick up the child. The travelling parent will be allowed to continue their journey if they wish to do so.

The Watchlist only prevents a child from being removed from Australia. It does not prevent a parent from travelling overseas.

A child can only be removed from the Watchlist with a Court order.

Other protections

The Watchlist is the most effective protection available to prevent a child being removed from Australia. The other available protections are:

1. If the child does not have a passport, a parent may refuse to sign a passport application form until there are proper parenting orders in place. In Australia, the signatures of both parents are required to obtain a passport for a child. It is important to note that some countries allow one parent to sign a passport application form;
2. If the child has a passport, then an application can be made to the Court for:
 - a. The travelling parent to surrender the passport to their lawyers, to be held in safe custody pending further order;
 - b. The travelling parent to surrender the passport, to be held by the left behind parent's lawyers; or
 - c. The travelling parent to surrender the passport, to be held by the Registrar of the Court.

Returning a child to Australia

A child who has been already removed from Australia may be returned to Australia in accordance with the Hague Convention. For this to occur, the country to which the child has been removed must:

1. Be a signatory to the Hague Convention; and
2. The Hague Convention must be in force as between the signatory country and Australia.

If a country meets the above two requirements, it is a 'recognised country'.

Your lawyer should be able to tell you which countries are recognised countries. A [full list of the countries](#) are available on the website of the federal Attorney-General's Department.

If a child has been removed to a recognised country then you will need to make an application to the Australian Central Authority ('the ACA') to have your child returned to Australia. You will need to do this within one year of the child being removed. You will need to complete a document called a 'Form 1' and a supporting Affidavit.

While it is possible to complete these forms yourself, it is advisable to get a lawyer to complete them for you. The ACA does not have to accept your application, so it is important that the forms are completed correctly and contain all the relevant facts.

If your application has been accepted, you will be notified in writing. The ACA will forward your application to the Central Authority of the country in which the child is located for that country to commence recovery proceedings. It is important that you do not commence any other proceedings in the overseas country, as this may impact on the Hague Convention proceedings

There is no way of predicting how long it will be before the child is returned to Australia. However, the sooner proceedings are commenced the better the chances of success.

What if I am the travelling parent?

If you are the travelling parent, you may have valid grounds to prevent the child being returned. These grounds involve family violence and acquiescence by the other parent. You should contact your lawyer immediately to find out your position.

In some cases if the child is ordered back to the country from which you removed them and you need to accompany them on the return trip, you may be eligible to have the left behind parent provide certain benefits to allow you to be able to live comfortably in that country. These are called 'soft landing conditions'. Again, you should speak to your lawyer about these.

What if my child has been removed to a non-Hague Convention Country?

If the child has been removed to a non-Hague Convention Country the process to have the child returned may be a lot more difficult. In these circumstances it may be advisable to engage lawyers in that country or you could alternatively liaise with the Department of Foreign Affairs and Trade. You should contact your lawyer to discuss your options further.

About Aitken Partners

Aitken Partners Family Law team has a specific interest and expertise in matters involving custody issues in cross-border situations.

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