Irish-U.S. family law explained

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The increase of bi-national marriages and relationships as a result of globalization has exacerbated the tragedy of child abduction across international borders.

A parent may lie awake in the darkest part of the night, disturbed by media reports of gruesome kidnappings by sinister strangers.

But by far the most common kind of child abduction involves one parent fleeing with the child, in the midst of or after a divorce or relationship breakdown. What hope is there for the panicked left-behind parent?

If the abductor has decamped to Ireland, there is, at least, some cause for hope.

81 countries, including the U.S. and Ireland, are members of an international treaty commonly referred to as the Hague Convention. The convention is not a mechanism for international custody disputes. It essentially offers only one avenue of relief, a proceeding to compel the return of the child (under the age of 16), to his or her country of habitual residence, so that the courts of that country can determine custody.

The purpose of the convention is to restore the status quo, which existed prior to the abduction. It is more than 20 years since the convention entered into force in the U.S., and one of the surprises has been that the overwhelming majority of abductors are mothers.

Each year, the U.S. Department of State is required to submit to Congress a report on compliance with the convention by the treaty partner countries. Ireland gets a clean bill of health for compliance with the convention.

Eight countries were evaluated in the 2009 report as non-compliant or demonstrating a pattern of non-compliance, including Honduras, Brazil, Chile, Switzerland and Greece. The primary non-compliance problem arises from the courts in those countries making custody determinations of their own instead of ordering the return of the child to his or her habitual residence.

With respect to Ireland/U.S. Hague cases, there were 11 new cases last year involving 19 U.S. children
wrongfully removed to Ireland, and four cases involving seven Irish children taken to the U.S.

While Ireland is deemed compliant with the Hague convention, that does not mean the left-behind parent can expect a speedy return of the missing son or daughter. Court processes and appeals take an inordinate amount of time to complete.

Although the convention contains a provision for the signatory countries to pay the legal fees incurred by the left-behind parent, the U.S. opted out of that provision. Accordingly, the left-behind parent in the U.S. faces the often rapidly escalating legal fees and the costs of traveling to Ireland for hearings.

Pursuant to the convention, an Irish court can refuse to order the return of a child to the U.S. for any one of seven possible reasons, including (1) delay; the application was not filed within one year of the abduction and the child is well settled in Ireland; (2) the left-behind parent was not exercising his or her custody rights at the time of the abduction; (3) the return of the child would expose him or her to physical or psychological harm or an intolerable situation; or (4) the child (of sufficient maturity) does not want to go back to the U.S.

If the left-behind parent’s Hague application fails, he or she faces the prospect of custody proceedings in Ireland, most probably governed by Irish family law.

Few Irish Americans could remain unaware of the fundamental changes that have taken place in Irish family law over the past 10 to 15 years. The 1995 Peoples’ Referendum lifted the constitutional ban on divorce. The resulting Family Law (Divorce) Act came into effect in 1997.

Unlike New York, the divorce system in Ireland is a “no-fault” process. In New York, a spouse must allege "fault" (such as adultery or cruelty), on the part of his or her spouse as a prerequisite for obtaining a judgment of divorce. The sole exception to this is the so-called "conversion divorce" where the husband and wife have lived separate and apart pursuant to a written separation agreement or decree for a period of at least one year.

However, the Irish Legislature did not make divorce a swift option. All applicants for divorce in Ireland must prove that the spouses have lived apart for at least four out of the five years prior to the application. The judge must also be satisfied that there is no reasonable prospect of reconciliation.

The law relating to property distribution and maintenance (also known as alimony) is fairly similar to the laws of New York, with a notable exception. Although in New York, there has to be allegations of marital fault (except for the conversion divorce), in order to be entitled to a divorce, the courts cannot take marital misconduct into account in determining the financial provisions unless the conduct rises to a highly egregious level, such as attempted murder.

The Irish judiciary, however, may pass moral judgment because they are specifically empowered to take fault into account in deciding who gets what.

Child custody in New York involves physical and legal custody, and such determinations are made on the basis of the “best interests of the child.”

In Ireland, all married parents are automatically legal custodians of their children (known as guardianship), and this cannot be taken away as a result of separation or divorce.

Physical custodial decisions in Ireland are determined on the basis of the “best welfare of the
child.” Unlike New York, this is specifically defined under Irish law to include the child’s best religious and moral welfare.

Divorce legislation was first enacted in New York in 1787. More than 200 years would go by before it took root in Ireland.

Last year, about 5,000 people applied for a decree of divorce in Ireland, but the divorce rates in Ireland remain the lowest in Europe.

Both the New York and Irish systems have room for reform, but each is moving towards greater promotion of mediation and collaborative divorce processes, to give people the option of trying to keep responsibility for family decisions in their own hands.

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