

“Mediating where the stakes are high: International Child Abduction Cases”

Jill Raby – presentation notes

Having recently been involved in cross national training for mediators in reference to Australian/Japanese Hague matters I would like to discuss the guidelines for Mediation in Hague Convention matters, the challenges and learnings for mediations dealing with family conflict more generally in an increasingly globalised world. (Note the taking parent nowadays more commonly primary carer.)

Do we all understand the convention?

- Habitual residence
- Wrongfulness or removal/retention – when it violates the rights of custody – care, duties, responsibilities
- Effective exercise of rights
- One year limitation
- Ban on decision on merits of custody

Exceptions:

- Non-exercise of custody rights/consent
- Grave risk physical/psychological/intolerable situation
- Objections/wishes of Child Support Agency social integration of child (if not lodged in 1 year)
- Violation of human rights, narrow construction.

OUTLINE:

- Bit about training
- What are the unique features of presenting clients
- How does process differ/is the same
- Specific points of interest re Japan

Discuss conference:

Facilitator

Eberhart Carl – mediator – retired appeals court judge – 1994 -2002 responsible for the Hague matters. Transformed the German-French parliamentary mediation initiative. 1999 created bi-national professional mediation project for cross-border family cases,

set up cross-border mediation project in Germany. German Federal Ministry of Justice head of division for mediation in international parent child cases.

Sybillie Kiesewetter- psychologist/mediator managing Director MKK (Mediation in International Conflicts Involving Parents and Children)

Delegates

What we have been doing in Australia : ISS, VLA

POINT 1

Many practitioners query how mediation may be appropriate in Hague Convention matters where the issues before the Court are limited – return or not.

- 1980 Hague Convention on Civil Aspects of International Child Abduction and 1996 Hague Child Protection Conference drew attention to the importance of promoting agreed solutions.
- Cross border legal proceedings in one country may be followed by or accompanied by legal proceedings in another country
- Usual considerations, ongoing need for co-operation, agreed solutions more sustainable, facilitates communication, cost effective, flexible process which can include other parties, allows discussion of legal and other considerations.
- Mediation is not hindered by jurisdictional restraints and rather than focussing simply on “return” and addressing the child’s best interests and underlying issues for the family

POINT 2

While challenging and rewarding usually marked by heightened anxieties and insecurities and generally in an environment where trust has been completely destroyed. Parents may feel disadvantaged, misunderstood and powerless. They are often immersed in the relationship conflict and it can be easy to lose sight of the child’s “story”.

- Terrified of irrevocably losing their child parents fight bitterly
- Suspicion that one party has a “home advantage” with their legal system (and mediator)

- Fears of re-abduction (resulting in limited option generation)
- Feeling unheard or unfairly accused of “abduction” when only “returning home”
- Different cultural backgrounds and parenting “norms”
- Discomfort in language
- Fear of criminal sanctions
- Fear of costs of legal and travel and support

POINT 3

Such mediations are usually conducted under the *clear* shadow of the law with tight time constraints. Basic premise of the Convention is that the place of the child’s “habitual residence” is the appropriate jurisdiction to deal with parenting issues.

- Return proceedings may have commenced (6 weeks rule) and strict time restraints apply
- Need for co-operation with the judicial and administrative systems
- Reliance on “exceptions to return”
- Need for clear and reliable legal information
- Difficulties with enforceability
- Visa and immigration law considerations

POINT 4

How to make the best of an impossible situation. General and as we do it.

Preparation:

Intense preparation is usually required in a short time frame. Co-mediation model.

- Usual screening. Allegations of family violence common, necessary to get a history from parties as to how the current situation has come about
- Practical discussion re will they be travelling, do they have supports, can the embassy assist etc.
- Access to Court documents/lawyer summaries
- Agreement to mediate
- Clarity of model; co-mediation (mixed gender/interdisciplinary/cross cultural/cross lingual) – how will work together
- How lawyers are integrated

- How interpreters are used (a person may feel more comfortable in mother tongue, how will other parent deal with this)
- How to engage with the left behind parent (usually initially contacted by email or phone)
- What technology is available/how will it be used
- Fixing times for 2-3 sessions over week
- How will the child's voice be heard
- What will be relayed to Court/authorities and when

Engagement:

(Usually commence in joint session, try for child focus)

- Using the Court's oversight as an impetus for "good behaviour" and that Court will expect consideration of conditions for return have occurred
- Using lawyers to ensure understanding of the Hague proceedings and subsequent proceedings
- Importance of connection (may involve discussion of practical issues, where are you staying etc. and asking the how has this impacted on you questions)
- Remember left behind parent usually in state of great shock and grief. Taking parent may also feel misunderstood. Their actions may have been an impulsive reaction to loss of relationship, running to the safety of home. May not have ever intended or thought about the child having no relationship with the other parent.

(Individual sessions can assist parties who may have fixed view to see things from another perspective "how would it have felt?", to look at the other possible outcomes, vent negative feelings and underlying fears and look at "conditions" for safe return)

- Flexibility
- Reflecting team (with co-mediator)
- Possible contact with child

(2nd joint session question "what do your kids need for good life")

- Leading option development ensuring look at if return ordered "short term and long term" and if return not ordered "short term and long term"
- Building some trust "importance of mid-mediation arrangement for some communication between left behind parent and child – brings child into focus
- Importance of "homework"

- Using lawyers for reality testing (e.g. wilful refusal to return giving rise to grave risk)

Agreement

- May need specific legal advice re enforceability etc.
- Lawyers may need time
- Hague judge may need to communicate
- Registration of orders/mirror orders

PREPARATION FOR CO-MEDIATION (CROSS BORDER)

- Do not underestimate or cut short
- Other mediator needs an understanding of the way you operate
- What methodology
- What practical aids
- What language
- How to use interpreters/mediator as interpreter
- Understand each other's culture

SPECIFIC POINTS OF INTEREST RE JAPAN

- Client presentation/communication style as modelled in conference
- Conciliation in all divorce matters
- Koseki
- Sole parental authority
- Lack of idea of regular contact
- Cultural behaviour in mediation
- Loss of face
- Use of convention as prevention
- Changing society

REFERENCES:

- Cross Border family mediation (Christopher Paul, Sybille Kiesewetter)
- Hcch Guide to Good Practice – Mediation
- International Parental Child Abduction Legal Resource ; Law Council