

Family Law Focus

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A review of Barzilay v. Barzilay (8th Cir. 2008) 536 F.3d 844

CASE SUMMARY

This case examines the role of Hague Convention in the protection of children internationally.

The filing of a Hague Convention petition in the state court is the proper method to have a court review whether a child has been wrongfully removed by a parent from the child's country of habitual residence or wrongfully retained in a country other than that of its habitual residence.

In *Barzilay* a former husband sought return to Israel of the children from his marriage by invoking the Hague Convention on the Civil aspects of International Child Abduction, Oct. 25, 1980 T.I.A.S. No. 11670 ("Hague Convention"). The Hague Convention seeks to protect children internationally from the harmful effects of their wrongful removal from the child's country of habitual residence or wrongfully retained in a country other than that of its habitual residence.

Only countries that are signatories to the Hague Convention are subject to its provisions. The protections of the Hague Convention are invoked in the United States by filing a petition in either federal or state court. The key inquiry is whether a child has been wrongfully removed from the

country of its habitual residence or wrongfully retained in a country other than that of its habitual residence.

A case arising from a petition under the Hague Convention is not a custody proceeding. The court in the country where the child is located merely has the authority to order the return of the child forthwith upon a finding that the child was wrongfully removed to or retained in another country.

Mrs. Barzilay, the former wife, petitioned the state court to modify the custody provisions contained within the divorce decree. Her husband moved to dismiss the petition on the ground that the state court lacked jurisdiction over the children's custody because of a prior decree issued by an Israeli court.

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Husband then initiated a federal action under the Hague Convention. The federal district court abstained under the "Younger Abstention Doctrine" per *Younger v. Harris* (1971) 401 U.S. 37, concluding that Husband had an adequate opportunity to litigate his Hague Convention claims in the state court proceedings. Husband appealed that decision which the federal court of appeals reversed for the following reasons.

Because neither parent filed a Hague Convention petition in the state court, the federal court of appeal



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concluded that the Hague Convention issues were not properly or fully raised in the state court proceedings and further, that in the absence of a Hague Convention petition in the state court proceedings, there was an inadequate opportunity to litigate the issues that would be raised by such a petition. Moreover, the Younger Abstention Doctrine does not apply in Hague Convention cases. Instead, had the Hague Convention petition been brought in the state court and that court rendered a decision on the merits of that petition, the proper response to a subsequent petition brought in federal court would have been to give full faith and credit to the state court decision and dismiss the petition on that basis.

The case was reversed and remanded to the district court for determination of the merits of the issues raised by Husband's Hague Convention petition.