

What Can Ensure the Return of Your Child from within China?

Description

One of critical and tricky issues in cross-border divorce is the fight by the divorcing parents for the custody of their children. When one of the divorcing parents is a Chinese citizen or used to be a Chinese citizen, this Chinese parent may wish to take their child into China (for purpose of this post, doesn't include Hong Kong, Macau or Taiwan), and the other parent fears that the child may be retained or "abducted" in China for good.

Actually I have been requested a few times in the past by foreign family lawyers to issue legal opinions to foreign family courts to explain the risks of child abduction in China once a child is brought into China.

I. The Landscape of Child Abduction Law in China

There are a few hard facts to know in China when it comes to child abduction law in China:

1. as many have known, China is not a signatory to the international Hague Convention on Child Abduction, thus the expeditious option of taking back the wrongly removed child as provided in the Hague Convention is not available in China, as that convention only applies when both countries to the matter are signatories or members of the convention.
2. Foreign court orders cannot be mirrored or registered or otherwise recognized in China, including interim injunction orders or other preventive orders. We understand courts in UK may issue prevented steps order to bar one parent from taking a child out of UK.
3. in many domestic cases where one parent takes away and conceal child out of the reach of the other parent in defiance of Chinese court judgments, Chinese courts are often not taking serious action to address the rampant problem, partly because it is a tradition in China that courts don't want to interfere much with family matters. Overall, in Chinese judicial practice, the enforcement of family judgments has been very sloppy indeed.
4. There are no clear rules in China about child relocation across borders. In judiciary practice, there are no established rules because there are simply very few precedent cases involving such issues. In other words, unlike many common law jurisdictions when parents cannot agree on such relocation issue, they can simply go to their court for a final decision, but it is not the case in China.

II. Particularly Tricky Issue: jurisdiction

Recently we are asked to give legal opinions to a UK court before which a couple are divorcing and one of the couple who is UK citizen (a migrant from China and still has family in China), wants to take their child into China, and the other party refuses to allow the child to enter into China, and have the UK court issue the "prohibited steps order". I was appointed to issue single joint expert opinions on the matter.

They first asked about what legal remedies available under Chinese law if the parent does take the

child into China.

As mentioned above, both parents are now UK citizens, so are the kids. If the one parent takes kids into China, the other parent may have no legal remedy at all at least for the first year after that parent takes their children into China, because Chinese courts won't have jurisdiction over the matter.

To file any case with a Chinese court, the general rule is that the defendant shall have either domicile or habitual residence in the place where the forum is located. If neither party is Chinese citizen having no domicile in China, and nor has resided in China, then when one parent brings children into China, before he or she resides legally in China for up to one year, the other parent may find it impossible to file a case against the parent abducting children into China.

On the other hand, if the parent abducting children into China has Chinese nationality (the household registration registration records), then it is easier for the other parent to file a case immediately against the abducting parent.

III. What can be Done?

I have been requested to provide legal opinions in two different cases where one party to the divorcing proceeding wants to take child into China but is barred by foreign court orders pending my legal opinions. In such cases where there is a good reason for one parent to take child into China, to mitigate the risk of the child being abducted in China, in light of the tricky jurisdiction issue, it may be advisable for the divorcing parents to come to an agreement sanctioned by the foreign court in respect of the child custody and anti-abduction risks.

There are a few obvious benefits of putting in place such an agreement:

1. jurisdiction problem solved: in this custody and anti-abduction agreement, the parties can agree to choose the Chinese court where the parent and child stay in China, as forum for potential dispute over child abduction, addressing the jurisdiction difficulty as described above;
2. as a result of any attempted abduction of their child, the custody (including care of control) of their child shall be awarded to the other parent who seeks to take the child out of China;
3. there can be an agreement on punitive damages to be paid by the breaching parent who attempts to abduct the child in China;
4. it can also be agreed that the breaching parent shall assume any and all legal costs associated with the efforts by the other parent who seeks to take the child back to his home country; and
5. there could be other provisions to be designed together with foreign family lawyers to ensure that it is an overwhelming burden for any party to breach such an agreement.

However it shall be noted that this is not a perfect solution that can guarantee the immediate and smooth return of abducted child out of China, it surely will increase the chances of success in getting back your children out of China.

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