

## Recognizing Risk of International Custody Abduction to the Non-Hague, Islamic Countries

By Kristine Uhlman / UmHani

**C**hild abduction to non-Hague, Islamic countries often occurs after years of liberal and unsupervised visitation, and even after a child's repeated uneventful visits to the Islamic country. This article explains the cultural reason for this occurrence, and some of the common triggers for abduction. Recognizing these reasons and triggers is important for assessing the risks of abduction. It is important to know that abduction risks often increase as the child grows and if the mother remarries.

It is crucial to evaluate the risks of abduction because there is virtually no legal remedy for obtaining the return of the child from an Islamic country. Furthermore, such abductions are common. The U.S. Department of State, Office of Children's Issues estimates that about one dual national American child is abducted every week to an Islamic country. Return of a child taken to an Islamic country has never been achieved through the legal process. In those few cases where an abducted child has been returned, it is usually due to help from the abductor's extended family that encouraged an Islamic mediation.

The U.S. Department of Justice, American Bar Association (ABA) project has an excellent publication identifying risk factors common to abductions.<sup>1</sup> This extensive work should be referred to for further guidance. However, one common risk factor for abduction should be noted: the threat to abduct was one factor common to most incidents. Furthermore, abduction by the father to an Islamic country is vastly more common than abduction by the mother. Unpublished data from the US Department of State and the author's own experience suggest that 97% of abducting parents are fathers.

### Recognition of American Divorce

Notably, Islamic law does not recognize foreign divorces. Therefore, a woman who divorces in the United States, may not be considered divorced in the Islamic country. For example, pursuant to Egyptian divorce law, if one of the parties to a divorce is Egyptian, Egyptian law is the only enforceable law and the divorce action must occur in Egypt.<sup>2</sup>

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A striking example of why the mother's marital status issue is important was seen in a case of a devout Muslim American woman who divorced her Egyptian husband under Islamic (Shari'a) law within the United States and then married another Muslim man. The Egyptian man abducted their three-year-old son to Egypt and accused the woman of infidelity because the divorce was not concluded in Egypt. The Egyptian court denied her custody of their son and found that her remarriage proved her infidelity. She received the following legal notification in response to her efforts to gain access to her son:

As for infidelity [that] was committed between the [wife], who professed Islam, and [her new Muslim husband], in the presence of official document, the marriage contract, before being divorced or divorced by



Photo of Kristine Uhlman and grown children, Hanan Ukayli and Maisoon Ukayli, abducted at the age of 2 and 4.

After the custody abduction of her two children on September 11, 1981, Kristine Uhlman studied Islamic law as it relates to women's and children's rights during divorce and custody disputes. She has provided expert testimony in 16 states, and helped identify protective measures to reduce the risk of child abduction.

the claimant [her Egyptian ex-husband], so she committed infidelity and polygamy. *The punishment of the said crime, by virtue of Allah Holly Sharea [sic], is stoning till death or keeping her in house till death.*<sup>3</sup>

Because Islamic countries do not recognize foreign divorces, the divorcing husband should obtain a complete Islamic declaration of divorce from the Shari'a court of his homeland. He should be ordered to do this by the United States court. A complete Islamic divorce consists of three divorce declarations documented by the *Shari'a court*. It is important that the divorce be obtained in the Shari'a court because it may not respect orders from its own government, which may be considered secular (and therefore not authoritative) by the country's religious authorities.

Examples of the disputes between the government and Shari'a law have played out in several cases. In one case, the Saudi government ordered the father to produce a child for a visit with the American mother. However, the Saudi father avoided the order by taking his case to the Shari'a court. In another case, an American mother won custody of her abducted child in the Shari'a court in Syria. However, the Syrian government was unable to quickly enforce the order and the father fled the country with the child. Obviously, it cannot be assumed that the Shari'a court within any country works in concert with its own government.

### Islamic Custody of Children

Child custody in Islamic countries is decided on an individual basis. Mediation and settlement between the parents is highly encouraged. However, there are strict assumptions made in Islamic law that are important to assessing risks of abduction. Under Shari'a law, a father is the natural guardian (*al waley*) of his children's persons and property and always holds legal custody. The father retains the right to decide where the child will live, how he/she will be educated, and whether the child can travel. Accordingly, even if a mother were to gain custody in the Shari'a court of the father's resident country, the father could prohibit the mother from returning the child to the United States. According to Shari'a, a child's paternal grandfather is his/her natural guardian after the father.<sup>4</sup> Under the laws of countries such as Kuwait, guardianship passes to the next relative on the father's side if the father and paternal grandfather are unable to act as guardian.<sup>5</sup> Depending on local laws, a father may be able to transfer his guardianship over his child to other family members. In abduction cases, a father brought into court in his Islamic country of residence may use this as a means of keeping the child in the cus-

tody of his relatives, and he may then claim that he lacks legal authority to return the child to the mother in the United States.

A mother generally has a right to physical custody of young children. However, as the child becomes older, Islamic law assumes that the child will be returned to the physical custody of the father or the father's family. Generally, the parent with physical custody cannot prevent the other parent from seeing the child. While the parent with physical custody cannot be compelled to send the child to the other parent's residence for visits, s/he must bring the child to a place where the other parent can see him/her.<sup>6</sup>

In order to have physical custody, a parent must fulfill certain conditions, the most important of which is to raise the child as a Muslim. In addition, the parent must also be capable of raising the child, looking

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after his/her interests, and protecting the child's physical and moral interests. Aside from these basic requirements, there are specific requirements based on the parent's gender.<sup>7</sup> Since, by definition, Muslim fathers satisfy the specific requirements of a male custodian,<sup>8</sup> the following discussion will address only the requirements placed on a mother.

#### Islamic Requirements for a Mother to Hold Physical Custody

American mothers of abducted children have been able to win physical custody of their young children in Syria, Egypt, Kuwait, and Saudi Arabia, as long as the mother agreed to reside within the country of the father's residence. In all those cases known to this author, the mother claimed to be Muslim.

To have physical custody, most juristic schools maintain that a mother must not remarry (unless she remarries certain of the father's relatives).<sup>9</sup> However, the Shias prohibit a mother from retaining custody if she marries *any other man* if the father is alive and eligible for custody.<sup>10</sup> Shias are found in Iran and have a following in Lebanon, Syria, Iraq, Afghanistan, and Pakistan. While only the Shia schools require a mother to be Muslim to have physical custody, the Hanafi school considers denouncement of Islam (apostasy) a sufficient ground for denying a mother who was previously Muslim her right to custody.<sup>11</sup> Among the Sunni schools, the Hanafi school is the most widespread and widely applied in modern Shari'a-based legislation. It is dominant among the Muslim populations of Turkey, Afghanistan, Pakistan, India, China, Bangladesh, Iraq, Albania, the Balkans, and the Caucasus. Syria, Egypt, and Jordan have also based their family laws on Hanafi jurisprudence. Jurists of the other Sunni schools generally only require that the mother raise the child in the Islamic faith. However, the Sunni schools maintain that a mother loses her right to custody if there is reason to believe that she would influence the child's religious beliefs so as to compromise his/her Islamic upbringing. Certain other requirements also must be satisfied for a mother to have custody, such as the requirement that the mother not house the child in a home where he/she is disliked.<sup>12</sup>

In recognition of an infant's need for female care, all Islamic laws give first preference to a mother's claim to physical custody of young children if she satisfies the requirements for a female custodian.<sup>13</sup> After divorce and during the period of the mother's custody, she is generally

entitled to receive child support from the father.<sup>14</sup>

The importance of the early nurturing and physical custody of the mother is emphasized and protected in many Islamic countries. Preserving the bond between mothers and their young children is so important that it may result in the children accompanying their mother to prison. In Saudi Arabia, for instance, the author observed that nearly half of the population of the Central Riyadh Woman's Prison in 1983 consisted of children under the age of seven years. Another American mother, who was imprisoned in the Kingdom during a divorce dispute with her Saudi husband in the early 1990s, also reported on the number of young children who accompanied their mothers into prison. One American woman told of a Saudi woman who had been imprisoned because her husband's family accused her of infidelity when she became pregnant several months after her husband's death. The Shari'a court would not separate a breast-feeding infant from the mother. Following the child's birth, the mother made every effort to extend breast-feeding and would not wean the child. After two years, the court found the mother unfit on religious grounds and the child was taken from her.

#### Age of Custodial Transfer

In Islamic cultures, fathers are responsible for the spiritual guidance and education of their children. Until a child reaches the age of spiritual awareness, his/her mother is the primary care provider. At the time of custodial transfer from the mother to the father, the child begins to participate in religious activities, such as prayers and fasting, and his/her father assumes his role as spiritual instructor and teacher.

The Hanbali and Shafii schools of Islamic interpretation do not distinguish between girls and boys regarding the duration of female custody. The Hanbalis (who are in Saudi Arabia and Qatar and have followers in

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other parts of the Arabian Peninsula, Jordan, Syria, Egypt and Iraq) maintain that the mother should have custody until the child reaches seven, at which point s/he may choose between the parents. The Shafii (which have a following in Jordan, Palestine, Lebanon, Syria, Yemen, Egypt, Indonesia, Brunei, the Philippines, Darussalam, Malaysia, Singapore, Sri Lanka, Thailand, and the Maldives) allow mothers custody until the child reaches the age of independence (often seven), and may choose either parent as custodian. Seven is often considered the age of independence. The Hanafi school distinguishes between boys and girls. Female custody of a boy ends when he is able to feed, clothe, and cleanse himself. Most Hanafi jurists set this age at seven, although some set it at nine. Hanafi jurists usually maintain that the mother's custody of a girl ends when she reaches puberty, set at either nine or eleven years of age.

A change in marital status of a custodial mother may exacerbate a Muslim father's concern for the appropriate upbringing of his child. In the Islamic cultures, remarriage by a mother is considered a voluntary relinquishment of the responsibility of physical custody of a child from a previous Muslim marriage.

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## Taxes

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case, the IRS sought collection of all of the taxes due from the respective spouse who was the sole record owner at time of sale. The Tax Court affirmed the IRS' position.

### SUMMARY

The section 121 provision for a \$250,000 exclusion from capital gains taxes is relatively new. Because it takes several years for the Commissioner's decisions to be challenged and Tax Court opinions to be written, there is little guidance regarding section 121's construction where the IRS challenges the exclusion of gain or inconsistent tax returns relate to the sale of the marital residence. The basic rules appear reasonably easy to interpret for the client. However, counsel should consult with the client's tax preparer as to the tax basis and/or for an opinion on what gain will be recognized in any of the following instances: the client's residence was purchased before 1997: both parties did not own and live in the residence continually for 24 months before the divorce proceeding was initiated: or the residence was a mixed-use property.

Finally, if the parties intend to file separate tax returns reporting the sale, either the parties should be counseled to coordinate with tax advisors or the Stipulations, MSA, or Judgment should be drafted to include provisions stating how the tax issues will be resolved to avoid inconsistent tax returns. By being attentive to details as to the marital home's acquisition, use, and sale during divorce proceedings, counsel can recognize and address complicated tax issues. ■

### Endnotes

1. See *Demirjian v. Commissioner of Internal Revenue*, (2004) T.C. Memo 2004-22, 87 T.C. M. (CCH) 841 which illustrates what happens when the parties file an erroneous federal tax return, and then one party amends the return attempting to correct the error.

2. Int. Rev. Code, § 1001(a) states that "gain" from the sale of property "shall be the excess of the amount realized... over the adjusted basis."

3. Int. Rev. Code, §§ 1011(a), 1012, 1016(a)(1) and Regs. § 1.1016-2(a).

4. Int. Rev. Code, §§ 1011(a), 1012, 1016(a)(1) and Regs. § 1.1016-2(a).

5. Regulations adopted in December 2002, Regs. § 1.121-1(b), T.D. 9030, 67 Fed.Reg. 78358 (Dec. 24, 2002) offer guidance as to what may constitute a taxpayer's "principal residence". Property which qualifies to be designated a "principal residence" includes a house trailer/mobile home and a houseboat. Vacant land, if adjacent to land containing the principal residence, may also qualify for the exclusion if sold within two years before, or two years after, the date of the sale or exchange of the principal residence.

6. The method of computation, and an explanation of how to calculate the fraction to be used, is set forth in Regulation section 1.121-3(g).

## Child Abduction

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### Summary

These religious and cultural expectations are important when assessing risk of abduction during a divorce. As a child reaches the age of custodial transfer, a father-abductor is more likely to acknowledge his cultural expectation of physical custody of the disputed child. For this reason, children around the age of five to seven years are most often abducted. As a father accepts his religious obligation to guide his child's spiritual upbringing, he may feel morally obligated to abduct as the child matures. Adolescent children who begin to challenge the authority of their parents are often at risk of abduction because of this.

*The information relating to the legal requirements of specific foreign countries is obtained from past experience and is not necessarily authoritative. Questions involving interpretation of specific foreign laws should be addressed to foreign counsel.*

### Resources

- American Bar Association, Center on Children and the Law: [www.abanet.org/child](http://www.abanet.org/child)

- United States Department of State, Office of Children's Issues: <http://state.gov>

- National Center for Missing and Exploited Children: [www.missingkids.com](http://www.missingkids.com) ■

### Endnotes

1. Girdner and Johnston, *Obstacles to the Recovery and Return of Parentally Abducted Children, Training, Technical Assistance, and Project Resources, A JUDGE'S GUIDE TO RISK FACTORS FOR FAMILY ABDUCTION AND CHILD*

*RECOVERY*, (1995); [www.abanet.org/child](http://www.abanet.org/child).

2. *Cairo v. Melani Rena George* (Saudi Arabia, 1999) Civil Action, Said El Arabi Mohammed Ahmed, South Cairo Court, Circuit 41 Personal Affairs/Foreigners (judicial document, translated from Arabic).

3. *Cairo v. Melani Rena George* (Saudi Arabia, 1999) Civil Action, Said El Arabi Mohammed Ahmed, South Cairo Court, Circuit 41 Personal Affairs/Foreigners (judicial document, translated from Arabic).

4. Nasir, *The Islamic Law of Personal Status* 2d ed., (1990).

5. *Id.* at p. 207.

6. Nasir, *The Islamic Law of Personal Status* 2d ed., (1990) p. 185.

7. Nasir, *The Islamic Law of Personal Status* 2d ed., (1990) p. 178.

8. *Id.* at p. 181.

9. Nasir, *The Islamic Law of Personal Status* 2d ed., (1990) p. 172.

10. *Id.* at p. 173.

11. *Id.* at p. 180 (The Shia and Shafii schools do allow a Jewish or Christian mother, to have physical custody over the child.).

12. *Ibid.*

13. Nasir, *The Islamic Law of Personal Status* 2d ed., (1990) p. 173-174.

14. Nasir, *supra*, note 29 at p. 139-140.

# FAMILY LAW NEWS

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## Message from the Chair

By Gregory W. Herring, Chair

**I** am honored to serve as the Chair of the Family Law Section's Executive Committee for 2004-2005. I will work hard to maintain the momentum generated by last year's Chair, Nancy Perkovitch.

Nancy is a great role model with a "human touch." This made her an effective leader. She has agreed to serve as an advisor for the coming year. Her continued presence will be highly appreciated.

Our Executive Committee will have two Vice-chairs, Peter M. Walzer and Kimberly Nystrom-Geist. Peter, who has offices in Calabasas, is the immediate past Editor of the Section's quarterly publication, Family Law News. Kim, whose offices are in Fresno, was our liaison to the State Bar's Council of State Bar Sections. Both Peter and Kim are proven "doers" and we are fortunate to have both of them committed to improving our Section.

Our Executive Committee has three major tasks: (1) we review, comment on, and generate new California family law legislation; (2) we publish Family Law News; and (3) we also produce high-quality Continuing Legal Education programs.

This year Mary Molinaro, who practices in Sacramento, is our Legislation Chair. She will direct all our work on new family law legislation. The legislative session will begin early in the year and culminate in September 2005. During this period, we will interact with legislators and their staffs and

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## Message from the Editor

By Jane S. Preece, Editor

**A**s you can see, there are new faces on the front of Family Law News. The enormously competent and generous Peter Walzer is stepping down as Editor after a wonderful year where he really made Family Law News shine. Thank you, Peter. Fortunately, though, I'll still have Megan Lynch, our production coordinator, helping me try to keep up with Peter's high standards.

For the last 15 years, I've been a lawyer for the poor at Legal Aid Foundation of Los Angeles. A couple years back, I applied to be on the Family Law Section Executive Committee. It was a surprise to me when I was chosen. Then came my first meeting a year ago, where I casually mentioned an interest in working on Family Law News. Now, here I am, the Editor. What a difference a year can make! Carole Cohen is my new Assistant Editor. A year from now, she'll be writing this column. However, this year you'll have to put up with my ramblings.

I see this past year as creating a windfall of opportunities for family law litigation. After *LaMusga*, every moveaway case is now worth a trial since any result is reasonably probable. Our office has already seen more moveaway cases, and denials of moveaways that would have been granted under

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