

JAMAICA

No. 2 – 2017

I assent,

[L.S.]

Sgd. P. L. Allen

Governor-General.

8th day of February 2017

AN ACT to Amend the Children (Guardianship and Custody) Act to give effect to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction 1980, and for connected matters.

[8th day of February 2017]

BE IT ENACTED by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica, and by the authority of the same, as follows:—

1. This Act may be cited as the Children (Guardianship and Custody) (Amendment) Act, 2017, and shall be read and construed as one with the Children (Guardianship and Custody) Act (hereinafter referred to as the principal Act) and all amendments thereto.

Short title
and
construction.

Insertion of new sections 7A, 7B, 7C, 7D, 7E, 7F, 7G, 7H, 7I, 7J, 7K, 7L, 7M, 7N, 7O, 7P, 7Q, 7R, 7S and 7T in principal Act.

2. The principal Act is amended by—

- (a) renumbering sections 7A and 7B as sections 7U and 7V respectively; and
- (b) inserting next after section 7 the following as sections 7A, 7B, 7C, 7D, 7E, 7F, 7G, 7H, 7I, 7J, 7K, 7L, 7M, 7N, 7O, 7P, 7Q, 7R, 7S and 7T—

Interpretation. **7A.**—(1) For the purposes of this section, and sections 7B to 7S—

“Central Authority” means, subject to subsection (2), the Minister with responsibility for justice;

“child” means a person under the age of sixteen years;

“Contracting State” means a State that is party to the Convention;

“Court” means the Supreme Court;

“Convention” means the *Hague Convention on the Civil Aspects of International Child Abduction 1980* entered into force on the 1st day of December, 1983;

“Foreign Central Authority” means in relation to any Contracting State other than Jamaica, an individual or entity designated as a Central Authority, and in respect of which formal notification of such designation has been sent to the Government of Jamaica;

“functions” includes powers and duties;

“requesting State” in relation to a child that is the subject of an application pursuant to section 7F, means—

- (a) the Contracting State in which the child is habitually resident; or
- (b) any other Contracting State from or in which the child has been unlawfully removed or retained;

“rights of access” includes the right to take a child for a limited period of time to a place other than the child’s habitual residence;

“rights of custody” includes rights relating to the care of the person of a child and in particular, the right to determine the child’s place of residence.

(2) The Minister with responsibility for justice may delegate to the Child Development Agency or any other individual or entity such aspects of the functions of the Central Authority as the Minister deems appropriate.

7B. Sections 7C to 7S, shall apply Application. to a child who is habitually resident in a Contracting State immediately before any breach of rights of custody or rights of access in relation to the child.

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Wrongful
removal or
retention of
a child.

7C.—(1) For the purposes of this Act, the removal to, or retention of a child in, a Contracting State is considered wrongful, where—

- (a) such removal or retention is in breach of rights of custody or rights of access of an individual or institution or other body, whether attributed to the individual, institution or body either jointly or solely; and
- (b) at the time of such removal or retention, those rights were actually exercised either jointly or solely, or would have been so exercised, but for such removal or retention.

(2) The reference in subsection (1) to rights of custody is to such rights—

- (a) as determined under the law of the Contracting State in which the child was habitually resident immediately before such removal or retention; and
- (b) arising by—
 - (i) operation of law;
 - (ii) judicial or administrative decision; or
 - (iii) an agreement having legal effect under the law of the Contracting State.

Functions of
Central
Authority.

7D.—(1) The Central Authority shall cooperate with the Foreign Central

Authority concerned to secure the prompt return of a child wrongfully retained or wrongfully removed.

(2) The Central Authority shall be responsible for—

- (a) carrying out the functions conferred upon it under this Act, including the taking of all measures that appear to the Central Authority to be necessary and appropriate to secure the prompt return of a child wrongfully retained or wrongfully removed from his or her place of habitual residence; and
- (b) carrying out such other functions that are conferred upon it under this Act and such terms of the Convention that are to be carried out by the Central Authority.

Other
functions of
Central
Authority.

7E.—(1) The Central Authority shall directly or through an intermediary, take measures that are appropriate including measures to—

- (a) discover the whereabouts of a child wrongfully removed or retained;
- (b) prevent further harm to the child or prejudice to an interested party, by taking, or causing to be taken, provisional measures to safeguard the best interests of the child;

- (c) secure the voluntary return of the child or facilitate an amicable resolution of any relevant dispute;
- (d) exchange, where desirable, information relating to the social background of the child;
- (e) provide information of a general nature as to the law of Jamaica;
- (f) initiate or facilitate the institution of judicial or administrative proceedings with respect to the prompt return of the child and, in a proper case, to facilitate effective exercise of rights of access;
- (g) where the circumstances so require, provide or facilitate the provision of legal assistance and advice; however, the Central Authority shall not be obliged to underwrite the cost of professional legal services not provided by attorneys-at-law employed within the public sector;
- (h) provide such administrative arrangements as may be necessary and appropriate to secure the safe and prompt return of the child.

(2) The Central Authority shall keep Foreign Central Authorities informed periodically with respect to the operation

of the Convention in relation to Jamaica, and as far as possible reduce the effect of any obstacle to the application of the convention.

Application
to Central
Authority for
assistance in
relation to
child

7F.—(1) Where any individual, institution or other body claims that a child has been wrongfully removed or retained in breach of rights of custody, that individual, institution or body may apply to the Central Authority for assistance in securing the prompt return of the child to the Contracting State in which the child is habitually resident.

(2) An application under subsection (1) shall include—

- (a) information regarding the identity of—
 - (i) the applicant;
 - (ii) the child; and
 - (iii) where available, the person alleged to have wrongfully removed or retained the child;
- (b) where available, the date of birth of the child;
- (c) the grounds on which the applicant's claim for return of the child is based; and
- (d) all available information relating to the where-about of the child and the identity of the person whom the child is presumed to

be with (if that person is not the person referred to in paragraph (a)(iii)).

(3) An application under this section may be accompanied by any one or more of the following—

- (a) a duly certified copy of any relevant decision of a judicial or other authority or of any relevant agreement;
- (b) a certificate, an affidavit or such other legal document as may be required by the Central Authority in support of the application, emanating from—
 - (i) the Foreign Central Authority concerned or other competent authority of the Contracting state in which the child is habitually resident; or
 - (ii) a duly qualified person, concerning the relevant law of that Contracting State;
- (c) written authorization empowering the Central Authority to act on behalf of the applicant, or to duly designate a Foreign Central Authority concerned or any other representative, so to act;

(d) any other relevant document.

(4) Where an application or supporting documents are not in English, such application or document shall be accompanied by a translation thereof into English, certified by the translator as being to the best of the translator's knowledge, a complete and accurate translation.

(5) The Central Authority may refuse an application where the Central Authority is satisfied that—

- (a) the requirements of this section are not met; or
- (b) the application is not well founded;

(6) Where the Central Authority refuses an application made under this section, it shall—

- (a) so inform the applicant and the Foreign Central Authority concerned forthwith; and
- (b) state its reasons for refusing the application, when informing the applicant and the Foreign Central Authority concerned.

(7) An application submitted under this section together with any document or information appended thereto or provided by the Central Authority or Foreign Central Authority concerned shall be admissible in Court as evidence of the facts stated therein.

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Central Authority of requesting State shall communicate the location of the child wrongfully removed or retained.

7G. Where the Central Authority receives an application under section 7F and has reason to believe that the child to which the application relates is in another Contracting State, the Central Authority shall, directly and without delay—

- (a) transmit the application to the Central Authority of the Contracting State where it is believed the child is located; and
- (b) inform—
 - (i) the Foreign Central Authority concerned; and
 - (ii) the applicant.

Court to act expeditiously.

7H. The Court shall have regard to the need to act expeditiously in proceedings for the return of a child wrongfully removed or retained.

Proceedings for the return of child wrongfully removed or retained.

7I.—(1) Having regard to the need to act expeditiously with respect to proceedings referred to in section 7H, the Court shall make every effort to make a decision within six weeks from the date of commencement of the proceedings referred to in section 7H.

(2) Where the Court has not reached a decision within six weeks from the date of the commencement of proceedings referred to in section 7H, the Central Authority or the applicant—

- (a) on its own initiative; or

- (b) if asked by the Foreign Central Authority concerned,

may request a statement of the reason for the delay and the Court shall provide such reasons no later than seven days of the date of receipt of the request.

(3) Where a reply is received by the Central Authority pursuant to subsection (2), the Central Authority shall transmit the reply to the Foreign Central Authority concerned or the applicant, as the case may be.

Proceedings
may be
stayed.

7J. Where the Court has reason to believe that the child has been taken outside of Jamaica, it may stay the proceedings or dismiss the application for the return of the child or make such other orders as may be appropriate.

The return of
a child
wrongfully
removed or
retained.

7K. Notwithstanding sections 7I and 7J—

- (a) where, at the date of commencement of Court proceedings, a period of less than one year has elapsed from the date the child was wrongfully removed or retained, the Court shall order the return of the child; or
- (b) where the Court proceedings are initiated after the expiration of one year from the date of the wrongful removal or retention of the child,

the Court shall order the return of the child, unless it is demonstrated to the Court that the child is now settled in his new environment.

Court may request proof of the wrongful removal or retention of a child.

7L.—(1) In any case where the child is not habitually resident in Jamaica, the Court may, prior to making an order for the return of the child, request that the person applying for the order, obtain from the Foreign Central Authority of the Contracting State in which the child is habitually resident, a court order or other determination that the removal or retention was wrongful.

(2) The Central Authority shall, so far as practicable, assist the person referred to in subsection (1) to obtain a court order or other determination as referred to in subsection (1).

Court may order the return of the child at any time.

7M. Notwithstanding the provisions of sections 7J to 7L, the Court may at any time order the return of the child wrongfully removed or retained as determined in section 7C.

Factors to be considered by the Court for the return of a child wrongfully removed or retained.

7N.—(1) Notwithstanding sections 7K and 7L, the Court is not bound to order the return of the child—

(a) if a person, institution or other body that opposes the child's return establishes to the satisfaction of the Court that—

(i) the individual, entity or other body claiming

rights of custody over the child was not actually exercising the rights of custody at the time of the wrongful removal or retention, or had consented to or subsequently acquiesced in the wrongful removal or retention; or

(ii) if there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

(b) if the child to which the application relates objects to being returned and has attained an age and degree of maturity such that it is appropriate for the Court to take account of the child's views; or

(c) where the return of the child would breach his rights under Chapter III of the Constitution of Jamaica.

(2) The Court, in making a determination under this section, shall take account of information relating to the social background of the child provided by the

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person or Foreign Central Authority concerned or other competent institution of the Contracting State in which the child is habitually resident.

The Court shall have regard to law of the requesting or Contracting State.

7O.—(1) The Court, in determining whether there has been a wrongful removal or retention of a child within the meaning of section 7C, may have regard to law and judicial and administrative decisions of the Contracting State in which the child is habitually resident, whether or not such decisions are formally recognized in that State.

(2) For the purposes of subsection (1), the Court is not required to make reference to the specific procedures for—

- (a) the proof of the law referred to in subsection (1); or
- (b) recognition of a foreign decision which would otherwise be applicable.

Court shall not decide on rights of custody of a child wrongfully removed or retained.

7P.—(1) Where the Court receives notice that a child has been wrongfully removed or retained in a Contracting State, the Court shall not decide the merits of any claim to rights of custody—

- (a) until there has been a determination of the question as to whether or not the child should be returned, and that determination is that the child is not to be returned; or

(b) unless the Court considers that—

- (i) there has been inordinate or undue delay in making an application under section 7F for the return of the child; and
- (ii) that it is in the best interest of the child to have the claim to rights of custody decided.

(2) Subject to subsection (3), an order made by the Court concerning the return of a child wrongfully removed or retained, shall not be taken to be a determination of the merits of any claim to rights of custody or rights of access.

(3) The Court, in determining whether or not to make an order referred to in subsection (2)—

- (a) may take into consideration the reasons for the award of rights of custody in the requesting State; and
- (b) shall take into consideration a decision of the Court, or of the requesting State or body within Jamaica,

and the merits of a claim to rights of custody shall not be a conclusive basis for refusing the return of a child.

Rights of
access.

7Q. Sections 7B to 7P shall apply with respect to arrangements for

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organizing or securing the effective exercise of rights of access for a child as they apply in relation to an application for securing the return of a child.

Person,
institution or
body may
apply directly
to judicial or
administrative
Authority.

7R. Where a person, institution or body claims that a child has been wrongfully removed or retained or that there is a breach of rights of custody or right of access, the person, institution or body, shall not be precluded from applying directly to the judicial or administrative authorities of a Contracting State for the appropriate relief.

Miscellaneous
costs,
expenses, *etc.*

7S.—(1) The Central Authority shall not require a security, bond, deposit or similar instrument to secure the payment of costs associated with court proceedings or where applicable costs associated with the participation of attorneys-at-law or advisers.

(2) The Central Authority may request that a requesting State pay the expenses (preparatory and otherwise) relating to the return of a child wrongfully removed or retained.

(3) The Court may direct that a person who wrongfully removed or retained a child or, as the case may be, prevented the effective exercise of rights of access or rights of custody to a child, pay the expenses incurred by or on behalf of an applicant under sections 7B to 7P, including the expenses associated with each of the following—

(a) travel;

- (b) locating the child;
- (c) legal representation;
- (d) the return of the child.

(4) The Central Authority and the Foreign Central Authority concerned shall bear its own costs in relation to any proceeding initiated pursuant to sections 7B to 7P.

Rights of
appeal.

7T.—(1) Notwithstanding the provisions of the *Judicature (Appellate Jurisdiction) Act* and the *Judicature (Rules of Court) Act* or any regulations made under those enactments, an appeal shall lie to the Court of Appeal from an order made by any Court under section 7K, 7M, 7N or 7P (hereinafter referred to as “the Court of first instance”), or from any refusal to make the order, or from the revocation, revival, or variation of the order.

(2) The Court of Appeal may, upon the hearing of the appeal—

- (a) confirm, quash, or vary the decision of the Court of first instance;
- (b) remit the matter, with the opinion of the Court of Appeal thereon or for rehearing generally, to the Court of first instance; or
- (c) make such order as the Court thinks just,

and may by the order exercise any power which the Court of first instance might have

exercised, and the order shall have the same effect and may be enforced in the same manner as if it had been made by the Court of first instance.

(3) The Court of Appeal may also make such order as to costs to be paid by either party as the Court thinks just.

(4) An appeal under subsection (1) shall be filed within fourteen days of the date of judgement of the Court of first instance.

(5) The Court of Appeal shall consider the appeal as a matter of urgency and shall endeavour to give its decision within six weeks from the date of the conclusion of the proceedings.”.

Passed in the Senate this 22nd day of July, 2016 with twenty-two (22) amendments.

THOMAS TAVARES-FINSON
President.

Passed in the House of Representatives this 6th day of December, 2016 with six (6) amendments.

PEARNEL CHARLES
Speaker.

Passed in the Senate this 20th day of January, 2017 with one (1) amendment.

THOMAS TAVARES-FINSON
President.

On the 24th day of January, 2017 the House of Representatives agreed to the amendments made by the Senate.

PEARNEL CHARLES

Speaker.

This printed impression has been carefully compared by me with the authenticated impression of the foregoing Act, and has been found by me to be a true and correct printed copy of the said Act.

Sgt. Heather E. Cooke
Clerk to the Houses of Parliament.