

The Hague Convention  
by Cynthia Stump Swanson  
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For those of us involved in family law, there are a lot of state and federal statutes with which we need to be familiar. There is a lot more out there than just Florida Statutes Chapter 61, which is entitled “Dissolution of Marriage; Support; Custody.” For example, Florida Statutes Chapter 63 governs all types of adoptions. Section 743.07(2) provides for the payment of child support for a dependent person beyond the age of 18 in certain circumstances. Chapter 751 provides for the temporary custody of minor child by extended family members. In addition, most family law practitioners are familiar with the alphabet soup of laws such as the UCCJEA, UIFSA, and the PKPA. One law which most of us have not had as much to do with is ICARA, the International Child Abduction Remedies Act, 42 USC §11601. This is the legislation passed by Congress in 1988 as the United States became a contracting member of the Convention of the Civil Aspects of International Child Abduction, which is otherwise known as The Hague Convention.

The Hague Convention is essentially a uniform law (much like the UCCJEA), which contracting countries may adopt to compel the return of a child who is wrongly removed from his or her habitual residence. The Hague Convention is intended to prevent one parent from gaining an unfair advantage in a custody dispute by taking a child to another country in order to invoke that other country’s jurisdiction.

A court hearing a petition brought under the Hague Convention is only supposed to determine which country will have jurisdiction to enter an order in any subsequent custody dispute. The court is not to determine the relative merits of the parties as parents, or the best interest of the child, in order to make a custody order. Instead, the court is supposed to determine whether the country from which the child was removed was the child’s “habitual residence;” and whether the “abducting parent” took the child away from his or her habitual residence without the consent of the “left behind parent.” If that is the case, then the court hearing the Hague petition should order the child to be returned to his or her country of habitual residence. The court should also make orders about who will pay for travel expenses, and any provisions that may be necessary for the child’s safety and welfare after the child returns to the country of habitual residence. In addition, the court is to consider an award of fees to the left behind parent if he or she prevails on the petition.

At first blush, it would seem that the two main factors required to be proven in order to prevail in a Hague petition would be fairly straightforward, and either true or not true. The left behind country either is or is not the child’s habitual residence, and the left behind parent either did or did not give his or her permission for the child to leave. But, as with much of the law, things are not always straightforward. The presence of domestic violence in the home from which the child has been taken has been considered by many courts as a very important factor in both the initial showing of habitual residence, and in the “grave risk” defense.

### Habitual Residence

A 2006 case from the 7th Circuit recognized that the existence of domestic violence may affect the determination of whether the left behind country was the habitual residence of the child. The 7th Circuit rejected the argument that the trial court should not consider abuse by one parent of the other in determining habitual residence, holding that the physical abuse of one spouse by another is a relevant factor in the court's determination of the existence of shared intent to make a place a family's habitual residence." *Koch v. Koch*, 450 F.3d 703, 719 (7<sup>th</sup> Cir. 2006). The reason for this analysis seems to be two-fold. The *Koch* court held that the husband's physical attacks against the wife gave him an incentive to seek a friendlier forum for custody, which is in direct contravention of the goals of the Hague Convention. But, in addition, the *Koch* court recognized that a determination of habitual residence should not be based purely on an observation of behavior, but must include an assessment of intent and settled purpose. Another court specifically stated "Where the Court finds verbal and physical abuse of a spouse to the degree present in this case, the conduct of the victimized spouse asserted to have manifested 'consent' [to move to another country] must be carefully scrutinized." *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1056 (E.D. Washington 2001).

### Grave Risk of Physical or Psychological Harm Related to Domestic Violence

There are several exceptions to the "rule of return," even if the two main factors (habitual residence and wrongful removal) are proven. In the main one, Article 13(b) provides that, notwithstanding the finding that a child has been abducted within the meaning of the Convention, a contracting country should not require the return of the child if there is a grave risk that the return would expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation.

Originally used to apply in situations where a child had been removed from a country involved in war or suffering from famine, etc., in the last seven or eight years, courts have expanded on the meaning of "grave risk" to include the exposure to domestic violence in a child's home. These cases appear to coincide with the general acceptance of sociological and psychological studies which show that, even where a parent has not abused a child, but has abused the other parent, the child is likely to suffer harm. See, for example, the following cases:

a. *Walsh v. Walsh*, 231 F.3d 204, 220 (1<sup>st</sup> Cir. 2000): "Credible social science literature establishes that serial spousal abusers are also likely to be child abusers. Both state and federal law have recognized that children are at an increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser."

b. *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1057 (E.D. Washington 2001): "Spousal abuse, found by the Court in this case, is a factor to be considered in the determination of whether or not the Article 13(b) exception applies because of the potential that the abuser will also abuse the child."

c. *Van De Sande v. Van De Sande*, 431 F.3d 567, 568 (7<sup>th</sup> Circuit 2005): "While the remedy of return works well if the abductor is a non-custodial parent, it is inappropriate when the abductor is a primary caretaker who is seeking to protect herself and the children from the other

parent's violence. . . In such a case, the remedy of return puts the victim's most precious possession, her child, in close proximity to her batterer either without her protection (assuming she does not return with the child) or with her protection, thereby exposing her to further violence."

### Burden of Proof

ICARA also establishes various burdens of proof which the parties must meet. §11603(e)(1) provides that the petitioner must establish by a preponderance of the evidence that the child has been wrongfully removed from his or her habitual residence. The respondent who opposes the return of the child and who alleges the return would result in a grave risk of physical or psychological harm must prove that defense by clear and convincing evidence.

However, in regard to the burden of proof which the respondent must meet in asserting the "grave risk defense," at least one court has held that while the defense must be established by clear and convincing evidence, subsidiary facts need only be proven by a preponderance of the evidence. "There may be twenty facts, each proved by a preponderance of the evidence, that in the aggregate create clear and convincing evidence." *Elyashiv v. Elyashiv*, 353 F.Supp.2d 394 (E.D. New York 2005).

Hague Convention cases are not among the most frequent that we family law practitioner encounter, but they are increasing in number, and the the body of law interpreting this treaty is growing.