

## The Hague Abduction Convention Trends in Litigation

### **Introduction**

Until recently, disputes involving international litigants were an anomaly in matrimonial practice. Typically if there were international implications of a matrimonial dispute they were largely ignored and the litigant who obtained the first order necessarily achieved a juridical advantage.

The unwitting result was judicially sanctioned forum shopping at best, and permissive child abduction at worst.

In 1988 the United States ratified the previously negotiated Hague Convention on Civil Aspects of Child Abduction. With that action both state and federal courts within the United States began to apply not only the provisions of the Convention in securing the return of wrongfully removed and retained children, but to address issues of jurisdiction and enforcement in the resolution of international matrimonial dissolutions.

Now that the case law has begun to develop as we have had more than a decade to work out the subtleties, litigation under the abduction convention has taken some interesting turns.

As the United States attracts immigrants from around the world, and American citizens study and work abroad with regularity, the opportunity for counsel to encounter a family case giving rise to the application of various state and federal laws and international treaties has increased exponentially. This requires counsel to not only recognize but anticipate the problems implicated by the termination of a family relationship where litigants have international ties.

### **I. Child Custody Litigation**

The majority of the cases across the United States addressing international family practice have arisen in the context of the resolution of child custody. As challenging as devising custody and access agreements may be in interstate cases, factors of distance, culture and enforcement make international child custody arrangements truly daunting. As such the motivation to litigate is enhanced when predictability of enforcement and difficulties of continuing access produce disparate positions.

The initial question to be resolved in any application is whether the court may exercise subject matter jurisdiction over a determination regarding child custody and access. Until very recently case law had usually limited the application of the Uniform Child Custody Jurisdiction Act in “international cases” to requests for the enforcement of foreign decrees pursuant to Sec 15 Uniform Act . Those cases developing in the

context of the abduction of a child stressed the requirement of litigants to utilize the Hague Convention on Civil Aspects of Child Abduction as an exclusive remedy and found that the jurisdictional provisions of the UCCJA were not determinative where the competing jurisdiction was outside the United States.

The result of such analysis was that the court when asked, almost always exercised jurisdiction if requested, basing their action on the general *parens patriae* power over a child located within its borders.

Eventually, with the growing number of cases implicating international jurisdictional issues, courts had to address the issues common to international civil litigation in the context of the family.

By way of example, in *Hosain v. Malik*, (671 A.2d 988 1996), the court was asked to address the enforceability of an order entered in a foreign jurisdiction. Because the jurisdiction in question, Pakistan, based its family code upon Islamic law, the Maryland court engaged in an analysis of the whether or not the process and substance of the issuing court were sufficiently similar to those, which would be engaged in by a Maryland court to warrant the extension of comity. Critical to a determination that comity could be extended to the proffered order was expert testimony that the ultimate basis of the code was the “best interest of the child standard”. That evidence, even in the presence of presumptions of custody, based upon principles of Islamic law and the entry of a custody judgment by default, was dispositive and the Maryland Court decided to extend comity and enforce the foreign judgment. But the trend of such analysis seems to be shifting. See *also, Laskosky v. Laskosky*, 504 So.2d 726(Miss.1987)

In 1996 the New Jersey Supreme Court issued an opinion in which it not only applied the provisions of the UCCJA to an International Child Custody Dispute providing comprehensive citation to the treatment of the issue throughout the United States, but indicated that even in the presence of “home state” the exercise of jurisdiction in an International matter required a *forum non conveniens* analysis. *Gulf Oil v. Gilbert* 330 US 501 67 S.Ct. 839, 91 L.Ed. 311 (1946). The Court also referred to the judicial communication requirements of the then newly negotiated but not yet ratified. The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (citation) makes its provisions fully applicable to international litigation. Currently, \_\_\_ states have ratified the UCCJEA. See *The Uniform Child Custody Jurisdiction and Enforcement Act* (with prefatory notes and comments, Vo. 32, No. 2, Family Law Quarterly, Summer 1998; *Turner v. Frowein*, 253 Conn. 312; 752 A. 2d. 955 (Conn. 2000)

## **II. International Child Abduction**

One of the most frequent motivations for international family litigation is the threat of the removal or retention of a child across borders, or filing to effect the return of a child abducted. The initial analysis is whether the country or countries implicated by the family history are signatories to the Hague Convention on the Civil Aspects of Child Abduction, *opened for signature*, October 25, 1980, T.I.A.S. No. 11670 (1980), 19 I.L.M. 1501 [hereinafter Abduction Convention]

### **A. Hague Convention Cases**

The Abduction Convention became United States law upon the enactment of federal enabling legislation, the International Child Abduction Remedies Act (ICARA), Pub. L.No.100-300, 102 Stat.437 (codified as amended at 42 USC 11601-11610 (1988)). The purpose of the Abduction Convention is to provide by treaty a civil remedy for the prompt return of children wrongfully removed from their country of habitual residence. Litigants may assert the protection of the Abduction Convention if they reside in a Contracting State, that is a country which has ratified or acceded to the the Abduction Convention, and the subject child has been wrongfully removed to or retained in another contracting State.

#### **1. LEGAL ACTION ON BEHALF OF A PARENT WHOSE CHILD HAS BEEN ABDUCTED TO THE UNITED STATES**

##### **(a) Bringing a Petition under the Abduction Convention**

The Abduction Convention is not a device for the resolution of the merits of a custody dispute. The stated purpose of the convention is to promptly restore the status quo, which existed before the wrongful removal or retention. The decision that a court is asked to make is exclusively whether or not the child in question should be physically returned. Although often thought of as a jurisdictional determination, in fact a return order does not establish or abridge subject matter jurisdiction for a determination on the merits.

The Convention permits both an administrative and a judicial remedy, and the two are not mutually exclusive. Each contracting state maintains an administrative agency denominated as the “Central Authority” for litigants requesting the return of their children. Most “left-behind” parents, as they are often described, will have filed with the Central Authority in the child’s habitual residence to seek assistance in the return. If

they have not, they should be strongly encouraged to do so. By filing a request for return they may be able to obtain assistance in the collection of documents, translations services and legal fee reimbursement. Once the request for return is filed in the habitual residence, it is communicated to the Central Authority in the United States. The United States Department of State, Office of Children's Issues serves as the Central Authority for all outgoing abduction cases. The National Center for Missing and Exploited Children (NCMEC), Alexandria Virginia serves as the receiving agency for all incoming cases.

Under the treaty the NCMEC is empowered to contact the abducting parent and encourage a voluntary return where appropriate. They can also contact judges to inquire as to the status of the litigation and provide legal authority and bench guides if requested.

#### (b) Consideration of Where to File

A petition for return may be brought in either state or federal court under ICARA. 42 USC 11603(a). The petitioner elects the forum by filing a petition. There is federal case law that indicates that the removing parent can not initiate a petition under the convention. *Ohlander v. Larson*, 114 F.3d 1531 (10<sup>th</sup> Cir. 1997); *See also Lops v. Lops*, 140 F3d. 927 , *reh. den. en banc. July 31, 1998* for a review of federal abstention doctrine in the case of parallel state and federal proceedings. Because abducting parents often seek to protect or legitimize their behavior by filing an application in state court for custody, it is recommended that an application for return be made to the federal Court. The federal court is less inclined to expand the scope of the proceedings into a best interest analysis, and more inclined to treat the proceeding in a summary fashion. Federal Judges are more familiar with the application of international law, the preemptive nature of federal law, and the enforcement of foreign judgments. (See Form Petition for return Appendix B)

#### Developing Issues

Choice of forum has become a more strategic question as the family bar becomes more familiar with federal court practice and the issues of absence and removal. In addition to the above cases, see *Bromley v. Bromley*, 30 F.Supp. 2d 857, (E.D. Pa. 1998). But see, *Miller v. Miller*.

#### (c) Contents of a Petition for Return

Whether brought in State or Federal Court the petition for return requires certain components under the Treaty.

Article 3 of the Abduction Convention sets forth the first of the prerequisites to asserting the protections of the Abduction Convention. A left behind parent must

demonstrate, that the alleged removal or retention is in breach of rights of custody attributed to the petitioner either jointly or alone, under the law of the State of habitual residence. Additionally the petitioner must show that those rights were actually being exercised at the time of the removal or retention, or would have been but for the removal or retention. The convention clarifies that those rights may arise of operation of law, judicial or administrative action or agreement having legal effect.

Article 4 applies the protections of the Abduction Convention to children who habitually resident in a contracting state immediately prior to the removal or retention and ceases to apply when a child attains the age of sixteen.

ICARA specifies that these prerequisites must be established by a preponderance of the evidence. ICARA, *supra* 42, USC 11603(e), *sec. 4*.

Should the specified criteria be met a return of the child is mandatory, subject to narrow exceptions.

Article 12 modifies the obligatory nature of return if the application is made more than one year after the removal or retention and the court finds the child has settled into the new environment. In that case the return is discretionary. *David S. v. Zamira S.*, 151 Misc. 2d 630, 574 N.Y.S. 2d 429(Fam. Ct. 1991); *In re Robinson* 983 F.Supp 1339, 1345 (D.Colo.1997), *In re Wojcik*, 959 F. Supp. 413 (E.D. Mich. 1997).

#### Developing issues:

Choice of law and the request of judicial or administrative findings under Article 15 of the Convention have become more common place. With the case law limitations on breadth of allowable defenses, the battle has been narrowed in many cases to the “wrongfulness” of the removal under the law of the habitual residence. See *Shalit v. Coppe*, 182 F. 3d. 1124 (9<sup>th</sup> Cir. 1999).

This can be resolved by putting in proofs of the law of the habitual residence or demonstrating that a finding of wrongfulness has, as a matter of law, been made.

In some cases, a decision may be made that the court of competent jurisdiction in the left-behind country should make the determination. The court can make the request of that issuing state for such determination.

However, if it is likely that the resolution will take longer than six (6) weeks, it is arguable that the petitioning party must consent to the delay.

#### (d) Habitual Residence

Often the applicability of the Treaty is challenged on the ground that the child's habitual residence has shifted or that the contracting state of the petitioner never served as the child's habitual residence. If a respondent is successful in advancing that argument, then the presence of the child in the United States cannot be considered wrongful within the meaning of the Convention. Then, the Treaty is inapplicable. This question can become particularly clouded in pre-judgment cases in which orders for custody have not been entered.

In *Feder v. Evans-Feder*, 63 F3d 217(3<sup>rd</sup> Cir. 1995) the Third Circuit Court of Appeals addressed a district court decision which held that the retention of the subject child in Pennsylvania could not be considered wrongful as the United States was the child's habitual residence rather than Australia. The litigants were American citizens who had previously resided in Pennsylvania, and recently moved to Australia.

In its decision the Court noted that the term "habitual residence" is purposefully undefined in the body of the treaty, however reviewed the case authority of other courts, particularly the seminal case of *In re Bates*, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989) to begin to describe habitual residence. Citing the High Court decision," *There must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or it may be general. All that the law requires is that there is a settled purpose, at p.10*"

The Feder court held that habitual residence," *is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the children's circumstances in that place and the parents' present , shared intentions regarding their child's presence there.*" *supra* at 223.

Accordingly, the Hague petition was reinstated and the matter remanded to complete the litigation on whether any legitimate defenses to return could be sustained.

Prior to this year, the leading case providing a comprehensive review of the application of the treaty and particularly the issues related to the wrongfulness of the removal and retention is *Friedrich v. Friedrich*, 78 F3d 1060; (6<sup>th</sup> Cir. 1996) (*Friedrich II*). The case evolved through protracted litigation arising from the break-up of the marriage of an American servicewoman stationed in Germany and her husband, a German national. The case has been taken to the Sixth Circuit Court of Appeals and recently back to the District Court, see *Friedrich v. Friedrich*, 983 F2d 1396; (6<sup>th</sup> Cir.1993) ("*Friedrich I*"), the initial case outlining the relevant case law in the application of the convention. This court ordered a remand on the issue of "exercise" of rights of custody and determination on a number of defenses. *Friedrich I* makes it clear that children living on a military facility are habitual residents of the contracting state in which the facility is located, regardless of their citizenship or residency status. Further the case reiterates that habitual residence is determined by looking backward, not

forward in time and from the perspective of the child, not the removing parent. Of note, the court indicates that, “*It [habitual residence] can be altered only by a change in geography, which must occur before the questionable removal and the passage of time, not by changes of parental affection and responsibility.*” *Friedrich I, supra*.

Both of these cases are demonstrative of relevance of citizenship or nationality in the determination of habitual residence. While evidential, citizenship cannot be considered dispositive.

While international construction of habitual residence has largely been consistent, review of selected cases should provide caution. Instructive is a recent Swedish case, *Johnson v. Johnson, Judgment of Supreme Administrative Swedish Court, Case No.7505-1995*. This case is described in parallel international litigation originating in Virginia, and eventually moving to Sweden. The Swedish family court, without regard to the pendente lite consent judgment entered in Virginia which denominated habitual residence in the United States, and provided for the child’s temporary return to Sweden found that the facts of location, settlement and duration had shifted habitual residence. *See also, Johnson v. Johnson, 26 Va. App. 135, 493, S.E. 2d 668(1997)*. The Swedish order is widely criticized in that the parties had specifically agreed that the issues of custody and access were to be resolved at hearing to be held in Virginia.

See also *Walton v. Walton*, 925 F. Supp. 453,( U.S. 1996 Miss) // and *Kanth v. Kanth*,79 F. Supp. 2d. 1317 (C.D. Utah 1999); *In re Villalta v. Massie*, Case No. 4:99 CV 312-RH (USDC N.D. Fla 10/27/99) *Toren v. Toren*, 26 F. Supp 2d 240 ( D. Mass 1998); *In re Morris*, 55 F. Supp. 2d 1156 ( D. Colo. 1999); *Mozes v. Mozes*, 19 F. Supp 2d 1108 ( C. D. Cal. 1998). *Mozes v. Mozes*, 2001, US App. Lexis 291; 2001 Cal. Op Service 429 (decided January 9, 2001); *Janakakis v. Kostin v. Janakakis* (Ky App. 1999)(pet. for cert. denied) 99-1496; 2000 US Lexi 4879, October 2, 2000.

(e) Rights of Custody

The other preliminary inquiry is whether the petitioner is exercising a right of custody that entitles them to the remedy of return. If a custodial determination has previously been made, and sole custody has been granted to the removing parent, subject only to rights of visitation of the left-behind parent, those rights of access do not entitle the petitioner to an order for return of the child. *Hague Convention supra Art.21*

Custody rights are defined in Article 5 (a) as, “*rights relating to the care of the person of the child, and in particular, the right to determine the child’s place of residence.*” The applicable law is the law of the child’s habitual residence. As such, a petitioning attorney may need to produce either the foreign custody order or applicable family code for submission to the court. *Meredith v. Meredith*, 759 F. Supp. 1432, 1434 (D. Ariz. 1991). However it is important to distinguish, particularly in an application made to a state court, that the purpose of the submission is not an application for the enforcement of a foreign judgment, which would require an analysis of the merits of the judgment and the procedure under which it was rendered, but evidence of the custodial rights enjoyed by the left-behind parent.

In *Loos v. Manuel*, 278 NJ Super 607, 651 A. 2d. 1077 (Ch. Div. 1994) the application for return to Germany was made by the petitioner who described their relationship with the child as one of, “foster parents”. In this case the defending respondents were the child’s grandparents in New Jersey, with whom his abandoning mother had left the child. The Court’s decision turned ultimately on the inability of the foster parents to provide authority for their rights of custody under German law. In the absence of an order providing, among other things, the right of the *Loos* to determine the child’s place of residence, the Hague petition was dismissed.

Still, *Friedrich II* makes it clear, “an American decision about the adequacy of one parent’s exercise of custody rights is dangerously close to forbidden territory: the merits of a custody dispute.”(cite) The decision goes on to caution that particularly in pre-judgment separation cases, the acts and motivations of a parent are difficult to analyze and that the analysis should be conducted by the court of competent jurisdiction. *Friedrich v. Friedrich*, 78 F3d 1060,1064 (6<sup>th</sup> Cir, 1996).

See also: *Croll v. Croll*, United States Court of Appeals for the Second Circuit, 2000 US App. 23719 decided September 20, 2000; *Sampson v. Sampson*, 975 P.2d 1211 ( Kan. Ct. App 1999); *In re H ( a minor)*, [ 2000] 2 WLR 337 ( Lords 2/3/00); *Pesin v Rodriguez*, 77 F. Supp. 2d 1277 (S.D. Fla. 1999); *USDC SD Fla.*, No. 99-6962; *Toren v. Toren*, 191 F. 3d (1999); *Kanth v. Kanth* 79 F. Supp. 2d. 1317 (C.D. Utah).

(f) Service of the Petition

A typical return application case would include the following pleadings; Notice of Petition Under the Hague Convention, Petition for the Return of Children to Petitioner, Order for Issuance of Warrant in Lieu of Writ of Habeas Corpus and/ or Order to Show Cause, Order for Return (See Forms Appendix)

(i) Notice of Petition Under the Hague Convention

The provisions of ICARA specify that notice of the Petition must be given “in accordance with the applicable law governing notice in interstate child custody proceedings.” 42 USC 11603 Sec.4(c) Under the Parental Kidnapping and Prevention Act, 28 USC 1738A, the litigant is directed to the provisions of the Uniform Child Custody Jurisdiction Act on the legal requirements for notice.

Both the UCCJA and the UCCJEA indicate that the respondent is to be provided with reasonable notice and opportunity to be heard. However, the expedited and summary nature of a Hague proceeding has been interpreted to support *ex parte* proceedings, conducted primarily on the pleadings and affidavits submitted, with an abbreviated time period for the answering papers of the respondent. In the recent case of *Wipranik v. Superior Court of Los Angeles*, 63 Cal. App. 4<sup>th</sup> 315 (Ca. App.1998), an abducting mother argued to the appellate court that she was not given sufficient time to prepare her response to the Father’s Hague petition. In assessing whether 10 days was adequate notice, the Court found that to determine reasonableness two factors must be weighed. “The desire to make a decision in a timely manner and the necessity of giving the

*contestants a reasonable amount of time in which to present their evidence” at 323, 739;* the appellate court upheld the 10 day notice.

(ii) If the location of the abducting parent and the child are known, and there is a concern that upon notice of the Hague petition the abducting parent may leave the jurisdiction the facts supporting such a concern should be prepared with an Order for the Issuance of Warrant in Lieu of Writ of Habeas Corpus . The primary relief requested should be to take the subject child into protective custody, or in the alternative to order that the child not be removed from the state pending the return date of the hearing on the petition. In *Brooks v. Willis* 907 F.Supp 57(S.D.N.Y) supported by proof of a pattern of unilateral removals on the part of the abducting parent, the district court entered on *ex parte* complaint a warrant in lieu of the writ for return of the child and ordered a Hague hearing to be heard within seven days after the child is returned.

#### Developing Issues:

In a recent case from Pennsylvania, the Federal Court determined that expedited proceedings that resulted the immediate return of a child without the opportunity of a full hearing was error. *Dincer v. Dincer*, 549, 309; 701 A. 2d. 210(1997); *Egervary v. Rooney*, 80 F. Supp. 2d. 491 (E.D. Pa. 2000); *In re Jeffers*, 26 FLR 1040 (Colo. App. 1999).

See also *Meredith v. Meredith*, 759 F. Supp. 1432 (D. Arizona 1991).

## 2. DEFENSES UNDER THE HAGUE ABDUCTION CONVENTION

The exceptions to the applicability of the Abduction Convention and the Defenses available once a finding of wrongful removal or retention has been determined is found in Article 12, Article 13 and Article 20 of the Treaty. The first and most effective response to a petition would be to assert that the Convention is inapplicable because the petitioner has not met the burden of demonstrating that he either; enjoys a legitimate right of custody at the time of the removal or retention; that the child was wrongfully removed or retained from his habitual residence; or that more then a year had passed since the alleged wrongful removal or retention and the child had settled in the new environment. *Hague Abduction Convention Art. 3 and 12.*

Once the petitioner has demonstrated the applicability of the Convention and established a *prima facie* case of wrongful removal or retention, the burden shifts to the respondent to demonstrate by a preponderance of the evidence that defenses available under Article 12 or 13 of the Convention should apply. ICARA 42 USC 11603 Sec 4(e) (2) (b). The respondent must establish by clear and convincing evidence that one of the exceptions set forth in Article 13b or 20 of the Convention applies. ICARA 42 USC 11603 Sec 4 (e) (2) (a).

(a) Article 13(a)

The court may deny an application for return if the respondent can demonstrate that the petitioning parent was not exercising rights of custody or had consented or acquiesced in the removal or retention. These cases tend to arise in pre-judgment litigation, or in circumstances in which a permitted temporary visit becomes unilaterally protracted. As the Friedrich II court cautioned, in the absence of significant proof of acquiescence, i.e. a consent order, or a writing of some kind the court will look to the objective evidence in the behavior of the parties. *Friedrich v. Friedrich (1996) supra*; See, *Wanninger v. Wanninger*, 850 F. Supp. 78(D.Mass 1994) (*consent to initial travel but no acquiescence of wrongful protracted retention.*) *Levesque v. Levesque*, 816 F. Supp 662(D.Kan.1993) A successful proffer of acquiescence may include correspondence acknowledging the petitioners relocation, lengthy delay in the filing of an application or demonstration that negotiation for resolution of the matrimonial difficulties presumed a change in habitual residence of the children. *In re A*, 1 AER 929 (Fam. Ct. 1992). See *Tabacchi v. Harrison*, 2000 W.L. 190576 (N.D. Ill 2000).

(b) Article 13b

The majority of cases raising a defense under the Hague Abduction Convention construe the applicability of Article 13b which provides in pertinent part:

*Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that...there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Hague Convention Art. 13b*

In one of the first court cases to address the meaning to be given to the term “grave risk of harm” the Appellate Court in *Tahan v. Duquette*, 613 A.2d 486 addressing for the second time the application for return by a Canadian petitioner regarding a child wrongfully retained in New Jersey. After an earlier determination that the Convention was applicable and the provisions of Article 12 not implicated, *Tahan v. Duquette*, 252 N.J. Super 554 (App Div 1991), the court addressed itself to the definition of “grave risk of harm.” The Court held that ‘grave risk hearing should be focused on the country to which the child would be returned and whether there is such internal strife or unrest there are to pose a grave risk of harm. Although the court may not delve into the merits of the custody dispute, the court may evaluate the surrounding to which the child would be returned and the basic personal qualities located there.’”

In the instructive *Friedrich II*, *supra* the Court in citing *Tahan v. Duquette* defines grave risk of harm as follows:

*We believe that a grave risk of harm for purposes of the convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute- e.g. returning to*

*a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, three when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection. Id. at 2604.*

See also *Friedrich v. Thompson*, 1:99 CV00772 (USD. North Carolina 1999).

An articulation of the narrowed circumstances in which a defense can be raised and litigated to a application for return, is found in *Caro v. Sher*, 296 N.J. Super. 594;687 A 2d 354 (Ch.Div. 1996) . In *Caro*, the subject children who were dual nationals of the United States and Spain were already denominated habitually resident in Alicante Spain by virtue of successful Hague hearing conducted three years earlier. The children were visiting the United States pursuant to an interim agreement of the parties. In defending the second application for return of the children, the respondent asserted that the petitioner was not “exercising” rights of custody pursuant to Article 13a, that the youngest child had developed significant psychiatric problems which could not be effectively treated in Spain . The respondent asserted that the child’s medical condition along with the father’s inability to manage the child created a grave risk of harm to the child and an intolerable situation for the entire family. Finally, the respondent asserted that that the Alicante family court was not, because of serious due process difficulties in the system, capable of addressing these concerns. Judge Hayser, in entering a return order, found that the respondent must not only demonstrate that a grave risk of harm exists, but that even in the presence of a claimed grave risk of harm, the foreign court cannot adequately address the issue, “*under some minimum, concept, for example of procedural due process.*” *Id. At 608.* See also *Janakakis-Jostin v. Janakakis*, KY. App. 1999 Lexis 24.

See also; *Re D*, [ 2000] 1 FLR 24, [2000] 1 FCR 208 ( High Ct. Fam Div. 9/6/99) *Blondin v. Dubois (Blondin III)*, 78 F. Supp. 283, decided January 12, 2000. See *P.F. v. M.F., The Supreme Court of Ireland 1992, No. 390 (transcript) 13 January 1993;* *D.C. v. B.L.C., High Court, January 1995.*

### Article 13

The remainder of Article 13 of the Convention provides that *the judicial authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.*” The Court in *Tahan v. Duquette* pronounced that a nine-year old child was not of sufficient age and maturity to be considered in the stated objected to return. In *Caro v. Sher*, *supra* he court declined to interview two of the children who were nine and twelve, finding that, “ *the above provision is discretionary. Such interviews will have no impact on the threshold question...*” at 608. It should be noted that many courts consider the objections of children as much more dispositive, and at younger ages.

### Developing Issues:

### Domestic Violence and “undertakings”

The issue of domestic violence has been a consistent theme in Hague Abduction litigation. The compelling argument that a removal or retention, particularly in a pre-judgment motion, is necessary for the protection of the minor child has created significant difficulty for courts.

The line between the assessment of grave risk of harm and that on the merits of a custody determination can often be blurred.

Recently, the New York court denied an application for return on issues associated with domestic violence. *Blondin v. Dubois*, 78 F. Supp. 2d. 283 (S.D.N.Y. 2000); 189 F. 3d. 240 (2d Cir. 1999);; *Tabacchi v. Harrison*, No. 99 C. 4130, U.S.D.C. for N.D. of Ill, E. Div., 2000 US Dst. LEXIS 1518, Feb. 10, 2000.; *Croll v. Croll*, 66 F. Supp.1 2d. 554 (S.D.N.Y. 1999)

It is important to remember that even if a defense is found under the treaty, the court can still order the return, subject in many cases an order of undertakings. Undertakings, a term more common in European jurisprudence, refers to orders which place conditions upon the return of the child.

See “*Domestic Violence: Is It Being Sanctioned by the Hague Convention*”, Regan Fordice Grilli, 4 S.W.J. of L & Trade Am, 71 Spring 1997; *Walsh v. Walsh* 221 F. 3d 204 July 25, 2000; *Re F (a minor) Abduction: Rights of Custody Abroad*, 1995 3 All E.R. 641 (Eng. C.A.) at 347-48.

### Article 20

Article 20 of the Hague Abduction Convention permits a court to decline to return a child upon presentation of clear and convincing evidence that, “*the return would violate fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms*”. In *Caro v. Sher, supra* the court addressed the allegation that the Spanish Family Court could not provide adequate due process protections and address the allegations of harm in a timely fashion. The court indicated that the consideration of an Article 20 defense is to be made as a *threshold issue for resolution, before any other possible exceptions are analyzed under the Convention.*” at 608 As such, any Article 20 argument should be addressed as a preliminary matter even in the presence of additional defenses for return.