INTERNATIONAL FAMILY LAW PROCEEDINGS: EMPHASIS ON CHILD CUSTODY

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August 20, 2009 updated February 17, 2016

I. HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION[1]

A. SCOPE, CENTRAL AUTHORITIES AND RETURN OF CHILDREN

Sitting in the heartland of the United States, one would assume little call for knowledge of international law in a family law practice. However, ignoring this aspect of the law for your clients can result in the failure to address critical issues in "typical" family law matters and limit your practice generally. Knowledge of international legal issues lends a level of sophistication increasingly necessary for all lawyers.

"The Hague Convention" is nomenclature for The Hague Convention on the Civil Aspects of International Child Abduction, which is a multinational treaty developed by The Hague Conference on Private International Law.[2] The treaty compels Contracting States to provide an expeditious method for the return of a child taken from one Contracting State to another. The proceedings on this Convention concluded October 25, 1980.

The Hague convention became law among signatories on December 1, 1983.[3] The Convention was drafted to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their

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[1] *See* the official web site of The Hague Convention at http://www.hcch.net/index_en.php?act=text.display&tid=1

[2] The Hague in the Netherlands is home to over 150 international organizations. The Hague first served as a center for international concerns in 1899, when the world's first Peace Conference took place in The Hague, followed by a second in 1907. A direct result of these meetings was the establishment of the world's first organization for the settlement of international disputes: the Permanent Court of Arbitration (PCA). After the establishment of the League of Nations, The Hague became the seat of the Permanent Court of International Justice, which was replaced by the UN's International Court of Justice after the World War II. It was at that first Peace Conference in 1899 that The Hague Convention was born. The original Convention banned the use of certain types of modern technology in war: bombing from the air, chemical warfare and hollow point bullets. The Convention also set up the Permanent Court of Arbitration. The Hague Conference on Private International Law occurred in 1893 to "work for the progressive unification of the rules of private international law." It has pursued this goal by creating and assisting in the implementation of multilateral conventions promoting the use of conflict of laws principles in diverse subject matters within the international community. Sixty-eight nations are currently members of the Hague Conference, including China, Russia, the United States, and all member states of the European Union as well as the European Union itself.

[3] The enabling legislation is the federal International Child Abduction and Remedies Act, 22 U.S.C. §§ 9001-9011 (additionally provides that "any court ordering the return of a child […] shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner").

habitual residence, as well as to secure protection for rights of access."[4] The primary purpose of the Convention is to preserve the status quo of whatever child custody arrangement existed immediately before an alleged wrongful removal or retention deterring a parent from crossing international boundaries in search of a more sympathetic court.

> The Convention is based on a presumption that, save in exceptional circumstances, the wrongful removal or retention of a child across international boundaries is not in the interests of the child, and that the return of the child to the State of the habitual residence will promote his or her interests by vindicating the right of the child to have contact with both parents, by supporting continuity in the child's life, and by ensuring that any determination of the issue of custody or access is made by the most appropriate court having regard to the likely availability of relevant evidence. The principle of prompt return also serves as a deterrent to abductions and wrongful removals, and this is seen by the Convention to be in the interests of children generally. The return order is designed to restore the status quo which existed before the wrongful removal or protection, and to deprive the wrongful parent of any advantage that might otherwise be gained by the abduction. [5] (Citations omitted)

The Convention applies only to children under the age of 16. In addition, only nations which have signed on and entered into this treaty are bound by it. It is critical to stay current with the status of member States, which you may do by checking the official web site.[6]

The Convention requires member States to establish a central authority to assist in the return of children wrongfully removed from their home states.[7] The central authority is the mechanism by with the Convention is enforced.[8] Article 7 details the steps that must be taken by the central authority when an application is made for the return of a child, which essentially requires prompt, diligent investigation and return of the child. The central authority is required to assist the left-behind parent in completing all the documents necessary for the commencement of an action to return or secure access to a child. Until recently, the United States Central Authority was the National Center for Missing and Exploited Children[9]. Although that contract ended in April 2008, this group continues to be an excellent source of information. The Central Authority for the United States is now the United States Department of State, Office of Children's Issues.[10]

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[4] Hague Conference on Private International Law, *Hague Convention on the Civil Aspects of International Child Abduction*, Preamble, (Oct. 25, 1980), http://hcch.e-vision.nl/index_en.php?act=conventions.pdf&cid=24 (last visited Sept. 15, 2009).

[5] Hague Conference on Private International Law, *Hague Convention on the Civil Aspects of International Child Abduction*, Outline, http://hcch.e-vision.nl/upload/outline28e.pdf (last visited Sept. 15, 2009).

[6] *See* Hague Convention Status Table, http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24 (last visited February 17, 2016).

[7] Links to the central authority of each member State may be found at http://www.hcch.net/index_en.php?act=authorities.listing (last visited February 17, 2016).

[8] This authority was further refined and enhanced in the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=70 (last visited February 17, 2016).

[9] National Center for Missing & Exploited Children, http://www.missingkids.com (last visited February 17, 2016).

[10] U.S. Dept. of State, Bureau of Consular Affairs, http://travel.state.gov/content/childabduction/en.html (last visited February 17, 2016).

When presented with a situation in which it is believed a child has been kidnapped to a member State, it is critical to act quickly:

1. Obtain and complete an application from the U.S. Department of State[11]
2. Determine if the central authority in the member State is compliant with the Convention[12]
3. Determine evidence of habitual residence
4. If there is not already a judicial determination of custody or parenting time, obtain one as quickly as possible
5. Consider filing a police report and requesting that the child's name be entered into the National Crime Information Center computer database
6. Contact the U.S. Embassy in the country or countries where you believe the child may be found to conduct a welfare and whereabouts visit to the child[13]
7. Contact the National Center for Missing and Exploited Children[14]

Habitual residence is the most fundamental element of the application of the Convention. The determination of the child's habitual residence is the triggering element of the Convention. Habitual residence is not defined in the Convention. However, the Explanatory Report by Elisa Pérez-Vera has been accepted by all contracting countries as the official interpretation of the Convention. She discusses the concept of habitual residence in some detail:

> The variety of different circumstances which can combine in a particular case makes it impossible to arrive at a more precise definition in legal terms. However, two elements are invariably present in all cases which have been examined and confirm the approximate nature of the foregoing characterization.
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> Firstly, we are confronted in each case with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person. Naturally, a refusal to restore a child to its own environment after a stay abroad to which the person exercising the right of custody had consented must be put in the same category. In both cases, the outcome is in fact the same: the child is taken out of the family and social environment in which its life has developed. What is more, in this

[11] U.S. Dept. of State, Bureau of Consular Affairs, http://travel.state.gov/content/childabduction/en/legal/for-attorneys.html (last visited February 17, 2016).

[12] The State Department in 2015 annual report identifies the following countries as demonstrating a pattern of non-compliance: Argentina, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, Guatemala, Honduras, India, Jordan, Lebanon, Nicaragua, Oman, Pakistan, Peru, Poland, Romania, Saudi Arabia, Slovakia, the Bahamas, Tunisia. *See* the U.S. State Department Compliance reportshttp://www.travel.state.gov/content/dam/childabduction/complianceReports/(S_238726)%20FINALNCC%20-%202015%20ICAPRA%20Annual%20Report%20(5-5-15).pdf (last visited February 17, 2016).

[13] Submit the request via facsimile to (202) 736-9132. Include the child's full name (as well as aliases), place and date of birth, full name and aliases of abducting parent as well as contact information. Include any other information which may assist in locating the other parent and child such as relatives. The consular officer must obtain permission from the abducting parent to visit the child.

[14] National Center for Missing & Exploited Children, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=244 (last visited February 17, 2016).

> context the type of legal title which underlies the exercise of custody rights over the child matters little, since whether or not a decision on custody exists in no way alters the sociological realities of the problem.
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> Secondly, the person who removes the child (or who is responsible for its removal, where the act of removal is undertaken by a third party) hopes to obtain a right of custody from the authorities of the country to which the child has been taken. The problem therefore concerns a person who, broadly speaking, belongs to the family circle of the child, indeed, in the majority of cases, the person concerned is the father or mother. [15]

Once the application is received by the central authority in the location where the child is suspected to be found, they are obligated to bring immediate proceedings for the return of the child.

PRACTICE TIPS:

- Prevention is always better than the trauma of abduction
- The U.S. State Department has a "Children's Passport Issuance Alert Program (CPIAP) which triggers an alert if a passport is made for a registered U.S. citizen child under 18. *See* http://travel.state.gov/content/childabduction/en/preventing.html
- There is no way to prevent travel once a passport is issued, and once issued, it cannot be revoked. The U.S. does not have exit control of travel. Once issued, the control of the passport is up to the parents. The best solution, if concerned, is to have the passport held by the court.
- Many countries permit dual citizenship and more than one passport.

The Hague Convention establishes five defenses to the return of a child who has been wrongly taken from its habitual residence:

1. The proceeding is commenced in the responding state more than one year after the wrongful removal or retention, and "the child is now settled in its new environment" (Article 12);

2. That human rights and fundamental freedom would be abridged if the return were permitted (Article 20);

[15] Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ¶ 11(1982), http://hcch.e-vision.nl/upload/expl28.pdf (last visited February 17, 2016).

3. The party now seeking return of the child "was not actually exercising custodial rights at the time of the wrongful removal or retention, or had consented to or subsequently acquiesced in the removal or retention" (Article 13 (a));

4. The return of the child "would expose [him or her] to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13(b)); or

5. 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" (Article 13 (b)).

A respondent who opposes the return of the child has the burden of establishing by clear and convincing evidence that one of the exceptions set forth in Articles 13(b) or 20 of the Convention applies, and, by a preponderance of the evidence, that any other exception set forth in Article 12 or 13 of the Convention applies.[16]. Importantly, a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory. Courts retain discretion under Article 18 to order the child returned even if they determine one or more of the exceptions applies.

1. One-Year Limitation Defense (Article 12)

When a child has been "wrongfully removed" or "wrongfully retained" within the meaning of Article 3 of the Convention, and the date of commencement of the judicial proceedings in the place where the child is found is less than one year from the date of the wrongful removal or retention, the child must be returned. Even where the proceedings have been commenced after the expiration period of one year, the return of the child must be ordered, unless it is demonstrated that the child is now settled in its new environment.

The International Child Abduction Remedies Act defines the term "commencement of proceedings" as the commencement of a civil action by the filing of a petition in any court which has jurisdiction and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.[17] There is no definition for when a removal or retention becomes unlawful. That is a question of fact for the court to determine.

PRACTICE TIPS:

- Proving knowledge by the left-behind parent of the intentional removal is critical to start the clock running: find letters, e-mails or witnesses who will testify with reference to the date the left-behind parent was fully cognizant of the fact the child would not be returned to the habitual residence
- This provision covers revocation of consent to travel or be away as well
- You will have to know the central authority in the place of habitual residence and its procedures, though be aware that applications can easily be made over the internet

[16] International Child Abduction Remedies Act, 22 U.S.C. § 9003(e).
[17] 22 U.S.C.. § 9003(f)(3).

2. Human Rights Defense (Article 20)

The return obligation of Article 12 is limited by Article 20, which states: "the return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

While the language of Article 20 has no known precedent in other international agreements to guide its interpretation, it is well established that it is an extraordinary remedy and will not be used to re-litigate custody on the merits, or for passing judgment on the political system of the country from which the child was removed.

PRACTICE TIP:

- A defense rarely, if ever, used. This provision was intended to deal with the rare occasion when the return of a child would utterly shock the conscience of the court or offend all notions of due process. It is almost never utilized by the courts.

3. Consent or Acquiescence Defense (Article 13(a))

The judicial authority may deny an application for the return of a child if the person "having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention, or had consented to or acquiesced in the removal or retention" under Article 13(a). This exception derives from Article 3(b), which makes the Convention applicable to the breach of custody rights that were actually exercised at the time of the removal or retention, or which would have been exercised but for the removal or retention.

The applicant seeking return need only allege that he or she was actually exercising custody rights conferred by the law of the country in which the child was habitually resident immediately before the removal or retention. The person opposing return has the burden of proving that custody rights were not actually exercised at the time of the removal or retention, or that the applicant had consented to or acquiesced in the removal or retention.

The consent and acquiescence inquiries are similar in that their focus is on the petitioner's subjective intent. These defenses cannot be implied by failure to take action. The defense of acquiescence requires an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time. Acquiescence requires knowledge of the child's location and reasonable access to and the means to secure the return of the child.

PRACTICE TIPS:

- The application should include a recitation of the circumstances under which physical custody has been exercised, including the definition of custody rights in the jurisdiction to which the applicant seeks to return the child
- Append any court orders or other documents detailing custodial rights
- Append any description of applicable law where the child was a habitual resident
- Often, the petitioner grants some measure of consent, such as permission to travel, in an informal manner before the parties become involved in a custody dispute. The fact that a petitioner initially allows children to travel, and knows their location and how to contact them, does not necessarily constitute consent to removal or retention under the Convention
- Acquiescence inquiry turns on the subjective intent of the parent who is claimed to have acquiesced. *Wanninger v. Wanninger*, 850 F.Supp. 78 (D. Mass. 1994). The defense of consent need not be expressed with the same degree of formality as acquiescence in order to prove the defense under Article 13(a). *See, e.g., In re Kim*, 404 F. Supp.2d 495 (SDNY 2005) (to establish consent defense, party must establish by a preponderance of the evidence that other parent had the subjective intent to permit removal of the child for an indefinite or permanent time period). The difference between acquiescence and consent is explained in *Baxter v. Baxter*, 423 F.3d 363 (3d Cir. 2005), where it held that Article 13(a) does not provide that if a parent consents to removal of the child for a period of time under certain conditions or circumstances, retention of the child beyond those conditions or circumstances is necessarily permissible.

4. "Grave Risk of Harm" Defense (Article 13(b))

In accordance with Article 13(b), a child will not be ordered returned where "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." Again, this provision was not intended to be used by defendants as a vehicle to litigate (or re-litigate) the child's best interests.

The person opposing the child's return must show that the risk to the child is grave, not merely serious. The definition of an "intolerable situation" was also not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to

safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition.

The principle case on this defense is *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996) in which it was held that a "grave risk of harm" for the purposes of the Convention exists in only two situations: 1) when return of the child puts the child in imminent danger prior to the resolution of the custody dispute – e.g., by returning the child to a zone of war, famine, or disease; or 2) in cases of serious abuse or neglect, or extraordinary emotional dependence, where the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

PRACTICE TIPS:

- Repetitive physical abuse is not enough without a finding that protection from abuse cannot be secured in the place of habitual residence without additional finding of emotional trauma upon return. *Blondin v. Dubois,* 189 F.3d 240 (2d Cir. 1999)
- Return to a war zone when there is no evidence that the danger is greater than when the parents voluntarily moved there is insufficient. *Silverman v. Silverman,* 338 F.3d 886 (8th Cir. 2003), cert. denied, 124 S.Ct. 1062 (U.S. 2004)
- The best interests of the child are not relevant in this evaluation. *March v. Levine*, 136 F.Supp.2d 831 (M.D. Tenn. 2000), aff'd, 249 F.3d 462 (6th Cir. 2001), cert. denied, 534 US 1080 (2002)
- In contrast, return to a violent parent with a criminal past and history of ignoring court orders has been denied. *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000)

5. "Wishes of the Child" Defense (Article 13(b))

A court may in its discretion 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." There is no defined age for determination. The court will examine possible coercion and manipulation by the taking parent.

The totality of the circumstances must be taken into consideration. In *Raijmakers-Eghaghe v. Haro*, 131 F.Supp.2d 953 (E. D. Mich. 2001), the court held that it was not precluded, as a matter of law, from taking into account the views of an eight-year-old child under the maturity exception of the International Child Abduction Remedies Act. In contrast is *Yang v. Tsui*, 2:03-cv-1613, 2006 WL 2466095 (W.D.Pa. Aug. 25, 2006), in which the court found that although the unlawfully detained child wished to stay in the United States and not return to Canada, that desire was the product of the passage of time during litigation, and giving in to that desire, would eviscerate the purpose of the Convention.

Additionally, in consideration of this defense to the return of the child, courts are required by the final paragraph of Article 13 to "take into account the information relating to the social background of the child provided by the Central Authority or other competent authority in the child's habitual residence." This provision has the dual purpose of ensuring that the court has a balanced record upon which to determine whether the child is to be returned, and preventing the abductor from obtaining an unfair advantage through his or her own forum selection and the resulting ready access to evidence of the child's living conditions in that forum.

PRACTICE TIPS:

- This is probably the only area where state family law practice is relevant; consider how this evidence will be conveyed to the court
- Evidence which by its nature is neutral will be most persuasive; use testimony of coaches, teachers, friends
- Caution should be exercised in securing the testimony of a mental health professional unless they can speak specifically to the maturity of the child in the context of child development and have input from both parents

Several states, including California, Arkansas, Texas and Florida, have promulgated statues intended to address international travel and custody issues. Generally, the custody determination factors include a requirement that the court consider factors that may indicate the child is at risk of abduction.[18] Minnesota does not have a statutory requirement. However, the traditional elements in Minn. Stat. § 518D allow for the issues to be raised

II. NON-CONVENTION INTERNATIONAL CHILD CUSTODY MATTERS

There is no better remedy than to prevent a child from traveling to a country which is not a signatory to the Convention or is non-compliant. It is often asserted that because wrongful retention of a child in a foreign country is a federal felony offense,[19] the risks of abduction should be minimal. Reliance upon such a rationalization is without reason. The parent is then trusting that the country where the child is to be taken will recognize and enforce, including extradition the abducting parent. Adding the layer of cultural differences and beliefs which may or may not support the return of a child to the other parent makes such reliance foolhardy indeed.

[18] *See* CAL. FAM. CODE § 3048; ARK. CODE ANN. § 9-13-406; TEX. FAM. CODE § 153.503; FLA. STAT. ANN. § 61.45(3).
[19] *See* International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. 1204.

PRACTICE TIPS:

- It is imperative that the judge be educated about the destination country in a neutral manner, including its legal system, culture, and customs
- Require a mirror order of the U.S. order be secured from the destination country. However, this does not guarantee the destination country will enforce the U.S. order; a Western European country will typically enforce such an order, but many Asian countries may not
- Factors that mitigate against permitting such travel include the following:
    - Potential abductor's lack of ties to the community
    - History of violence or threats of violence
    - Strength of family connections in destination country and lack of such connection in the home state
    - Home ownership or the lack thereof
    - Lack of employment or easily transferable skills
    - Lack of U.S. citizenship or existence of dual citizenship
    - Destination country customs toward the other parent
    - Strong ties to the destination country
    - History of n on-cooperation with the other parent
- The best protection is a large enough bond filed with the court to make the wrongful removal untenable
- Consider also the UCCJEA, codified at Minn. Stat. § 518D, as an alternative or co-existent approach; *See* Minn. Stat. § 518D.105 International application.

III. OTHER INTERNATIONAL CHILD-RELATED ISSUES

While for many years' rights of access, Article 21, were ignored in U.S. courts that trend has recently changed, see In re S.E.O., 873 F. Supp. 2d 536, 545-46 (S.D.N.Y. 2012) aff'd in part, vacated in part, remanded sub nom and Ozaltin v. Ozaltin, 708 F.3d 355 (2d Cir. 2013).

Recovery of child support and, in some cases, spousal support, has recently been addressed by the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.[20] Following upon the success of the Convention for the return of children who have been abducted with the utilization of a central authority and access to free legal services, this act should be effective.

A little mentioned *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the*

[20] Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, http://www.hcch.net/index_en.php?act=conventions.text&cid=131.

Protection of Children exists, though it is rarely applied. Its limited use has been a concern for the members of The Hague and as such, expansive application has been encouraged. This Convention is much broader in scope than the child abduction Convention. It covers a range of civil measures for protection of children, from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of children's property. Particularly designed to prevent conflicting application of law, it has uniform rules to determine which country's authorities are competent to act. It clearly reinforces the philosophy of return to habitual residence found in the Convention and designed to prevent child abduction. The primary responsibly to act lies with the place of the child's habitual residence. This Convention determines which country's laws are to be applied, and it provides for the recognition and enforcement of measures taken in one member State in all other member States. In addition, the co-operation provisions of the Convention provide the basic framework for the exchange of information and for the necessary degree of collaboration between administrative (generally child protection) authorities in the different Contracting States. The 1996 Convention reinforces the 1980 Convention by underlining the primary role played by the authorities of the child's habitual residence in deciding upon any measures which may be needed to protect the child in the long term. It also adds to the efficacy of any temporary protective measures ordered by a judge when returning a child to the country from which the child was taken, by making such orders enforceable in that country until such time as the authorities there are able themselves to put in place necessary protections.[21]

IV. INTERNATIONAL CASES WITHOUT CHILDREN

International cases walk in the door in other ways too. Here are some examples:

- Single, pregnant German national woman with substantial assets in Germany as well as expectancy to inherit more and plant to marry a U.S. citizen in the U.S.
- U.S. citizen married to U.S. citizen, both have lived in France for 6 years and acquired assets which are located there and in Minnesota.
- U.S. citizen married to British national with business interests and assets in China and Great Britain.
- Minnesota residents who live half the year in Minneapolis and half the year in Costa Rica with assets in both locations.

V. OTHER CONCERNS

1. DOMICILE

Very often, the most difficult and most important determination in any international case is domicile. In almost every jurisdiction, it is commonly held that every person has domicile – one cannot choose to be without domicile, though a person can change domicile at will. An existing domicile is presumed to exist until a new domicile is established. The law of the country or state where the litigation will take place will determine domicile. Thus, the local courts can determine

[21] *Supra,* at note 4.

that the person has domicile in another location even if the domicile requirements of that other jurisdiction has not been satisfied or vice versa.[22]

The usual indices of which are evidence of the requisite intent to establish domicile:

- Primary residence
- Taxes paid
- Voting record
- Drivers license
- Mailing address
- Physical presence
- Membership in clubs or organizations
- Applications completed where residence is disclosed
- Bank accounts
- Health insurance and medical care
- Schools attended

2. SERVICE OF PROCESS

Prior to The Hague Convention, service of process was entirely a hit or miss prospect. Beyond the expected problems of securing cooperation from a foreign government and legal system to permit the service of process, are the intrinsic problems of language and custom. Before the Convention, one had to obtain a *Letter Rogatory* – a formal process in which the transmission of the document to be served to the Ministry of Foreign Affairs where the object of service was located requesting that the Minister have the local courts secure service. This is the process which still must be followed in countries that are not signatory to the Convention, which includes a surprising number of Western nations. Always check the Convention website when you begin the process.[23]

3. COMPLICATIONS

a. Common Law and the European Union

The common law, which is most simply put based on interpretation of statute and precedent, is not what happens in most of the rest of the world. Unlike our conflict of laws rules, the transactions between nations evolve from treaties and formal negotiations intended to protect the self interests of the individuals within the nations. Civil code law is not only different law, but a completely different mindset. Generally, the role of the judge is more that of a prosecutor having the authority to investigate evidence, call witnesses and the like. Discovery may be completed by the court. There is little in the way of consequence for failure to openly disclose assets. Fault

[22] *See* Jeremy Morley discussion*, The General Rules of Domicile*, www.international–divorce.com (Interesting concepts of domicile of choice, domicile of origin and domicile of dependency (married woman) arising out of old common law continue in some of the former British colonies).
[23] *Id.* at 5.

may be an issue in some jurisdictions (France) and spousal support may be irrelevant (Finland). The European Union (EU) has attempted to cut down on forum shopping and the race to the court house by providing for a conflict-of-laws type rule. Known as Rome III, draft legislation, which has not been approved by all member states, the rule enables a binding choice of divorce jurisdiction as well as a binding choice as to what law applies. Member states such as Sweden fear being required to adopt Islamic law. Great Britain has not approved the rule, but it is likely that some states will adopt a modified form of Rome III.

b. Marriage Contracts and Pre-Nuptial Agreements

Pre-nuptial agreements, which we in the U.S. understand to be contracts made in anticipation of marriage for enforcement at the time of death or divorce, can be applied in term and concept in a variety of settings quite differently. For instance, in the Netherlands enforceable contracts between parties in anticipation of divorce are quite common, while generally in the U.S., these marital termination agreements are not enforceable until approved by the court. Pre-nuptial agreements are generally enforced in the jurisdiction in which the divorce occurs or the estate is distributed. Provisions within pre-nuptials regarding jurisdiction for enforcement (typical in U.S. drafted documents) may or may not be respected in other countries:

- Great Britain: pre-nuptials are generally not binding, though there has been some movement in the very recent past making their enforcement very similar to that in Minnesota. The agreement must be fair in the eyes of the court at the time of the enforcement. English courts may, in the case of a foreign pre-nuptial, decline to accept jurisdiction over the divorce
- France: a matrimonial regime is a body of rules about the effect of the marriage on the administration, the enjoyment and disposal of property of spouses during marriage. The marriage contract is solely to determine the matrimonial regime. Spousal support, or alimony, is not recognized in French law and as such would not likely be recognized if it were contained in a pre-nuptial
- South Africa: generally speaking, the pre-nuptial that does not offend public policy will be enforced, while taking into consideration the matrimonial rule of law that the husband's domicile at the time of marriage controls
- Germany: pre-nuptials are enforceable like any contract except where so grievously unfair as to shock the conscious of the court
- Russia: pre-nuptial agreements, or marital contracts, in Russia are enforced and are regarded as a forceful legal instrument. These marital agreements determine the financial rights and obligations of the spouses. The agreements cannot restrict the legal capacity of a spouse, waive the right to challenge the agreement in court, or restrict maintenance for a disabled spouse. Time limitation for challenging marital contracts is very short.

VI. CONCLUSION

International family law is here to stay. Knowledge of what you do not know is as important as that of what you do know. Be open to the possibility in any case that there may be an international element to consider and even apply.