

Commentary: Other Cases

Montes v. Toscano (*In re M.V.U.*), 2020 IL App (1st) 191762

Relevant Seventh Circuit Cases

Khan v. Fatima,
680 F.3d 781 (7th Cir. 2012)

Van De Sande v. Van De Sande,
431 F.3d 567 (7th Cir. 2005)

Domestic Violence | Grave Risk | Child Not a Target of Abuse | No Expert Witness Required to Testify to Psychological Dangers to the Child

This case addressed the question whether domestic violence against a parent poses grave risk to a child.

Holding

The Illinois appellate court held that domestic violence perpetrated against the mother in this case constituted grave risk to the child.

Facts

An unmarried couple had a daughter, born in Mexico in 2014. The child was raised there until 2017, when her mother moved with the child to Chicago. The mother petitioned the Illinois circuit court to establish paternity, custody, and support. The father countered with a petition under the 1980 Convention for return of the child to Mexico. The Illinois circuit court found that the father established a prima facie case under the Convention, but it sustained the mother's exception to return based on his abusive conduct and denied his petition for return.

The mother cited three specific instances of abuse: (1) during an argument in 2017, the father grabbed her by the neck and choked her while she was holding their child (then two years old); (2) he threatened that he would kill the mother before he would allow her to relocate with the child to Chicago; and (3) he persistently refused to allow her to work outside the home. The court credited the mother's version of the facts and found that the father's denial was not credible. The court also found that this history of domestic violence posed a grave risk of physical and psychological harm to the child and her return would result in an intolerable situation. The father appealed to the Illinois court of appeal.

Discussion

The Illinois First District Appellate Court affirmed. The court noted that this case raised issues of first impression in the Illinois state courts, but relevant decisions from the federal judiciary's Seventh Circuit had persuasive value.¹

1. Montes v. Toscano (*In re M.V.U.*), 2020 Ill. App. (1st) 191762, para. 32.

The father argued that the two isolated incidents of choking and threatening to kill did not rise to the level of grave risk required by the Convention and ICARA (clear and convincing evidence). Under *Monasky v. Taglieri*,² the principal exception to the Convention’s requirement for return is grave risk under Article 13(b). The appellate court also noted the growing recognition that children can be harmed by domestic violence against a parent and cited a 1990 concurrent congressional resolution:

[T]he effects of physical abuse of a spouse on children include actual and potential emotional and physical harm, the negative effects of exposure to an inappropriate role model, and the potential for future harm where contact with the batterer continues; . . . children are emotionally traumatized by witnessing physical abuse of a parent; . . . children often become targets of physical abuse themselves [C]hildren who do not directly witness spousal abuse are affected by the climate of violence in their homes and experience shock, fear, guilt, long lasting impairment of self-esteem, and impairment of developmental and socialization skills.³

The appellate court acknowledged that judicial consensus in this area “has not emerged,”⁴ with some courts reading the grave risk defense narrowly, and others—including the Seventh Circuit—according a broader view and recognizing domestic violence as a grave risk.⁵ The Illinois court cited Seventh Circuit precedent: “If handing over custody of a child to an abusive parent creates a grave risk of harm to the child, in the sense that the parent may with some nonnegligible probability injure the child, the child should not be handed over.”⁶

The court also found that a grave risk defense may be made even when the violence is not directed at the child and cited the Second Circuit decision in *Souratgar v. Lee*.⁷ Finding that the lower court correctly determined that a grave risk to the child had been demonstrated and citing *Souratgar* and *Walsh v. Walsh*,⁸ the court of appeals noted,

The evidence and testimony presented in support of this defense demonstrated a pattern of escalating violence as well as a pattern of interference with [the mother’s] personal liberty which, in turn, effected the psychological welfare of the child.

In total, [the mother’s] evidence clearly and convincingly established a pattern of escalating domestic abuse beginning with [the father’s] demand she obtain an abortion and ending with him choking her while she held the child in her arms and making repeated threats on her life. In our view, the evidence demonstrates that the child faces “a real risk” of being hurt psychologically due to her witnessing these events. For this court to set aside the circuit court’s credibility and factual findings and grant [the father’s] Hague petition would be to ignore the fact that domestic violence toward a partner does cause grave harm to the child or place the child in an intolerable situation. As recognized by the First Circuit, “credible

2. 140 S. Ct. 719, 723 (2020).

3. H.R. Con. Res. 172, 101st Cong., 104 Stat. 5182, 5182 (1990).

4. *In re M.V.U.*, 2020 IL App (1st) 191762, at para. 41.

5. *Id.* (citing *Van De Sande v. Van De Sande*, 431 F.3d 567, 571 (7th Cir. 2005) and *Khan v. Fatima*, 680 F.3d 781, 786 (7th Cir. 2012)).

6. *Id.* (citing *Van De Sande*, 431 F.3d at 571).

7. 720 F.3d 96, 104 (2d Cir. 2013).

8. 221 F.3d 204, 220 (1st Cir. 2000).

social science literature establishes that serial spousal abusers are also likely to be child abusers.”⁹

The court rejected the father’s claim that in order to support a grave risk defense, domestic violence must have occurred over an extended period of time and involve vicious circumstances. The court instead concluded that a domestic violence victim need not endure years of abuse in order to establish the defense. The court found that the father exhibited an “escalating pattern of verbal and physical abuse, which included restrictions on the mother’s movement and employment.”¹⁰ This was sufficient to support the mother’s grave risk defense.

The father also argued that the mother could not prevail in the absence of expert opinion regarding the psychological impact of the domestic violence on the child. Rejecting this position, the court noted that neither Article 13(b) nor case law requires expert testimony to establish psychological harm. It also pointed to the financial imbalance of litigation power: the mother, a victim and custodial parent, cannot be required to underwrite the services of an expert to corroborate her claim that the domestic violence in this case amounted to a grave risk to the child.

9. *In re M.V.U.*, 2020 Ill. App. (1st) 191762, at para. 48 (citations omitted).

10. *Id.* at para. 49.