Welcome

The International Family Law Committee bids you welcome.

We intend to provide timely information concerning international family law to all members of the International Law Section. Please email your ideas, announcements and contributions to the committee listserv at intfamilylaw@mail.abanet.org.

Hot Topics

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Website

The International Family Law Committee is revamping its website. We would like to make a website that is easy to use and provides pertinent information to our members. The Committee Steering Group asks that any committee member who has suggestions as to what to include on the website, or who would like to help with this work, please let us know by emailing the committee's listserv at intfamilylaw@mail.abanet.org.

Committee Meeting

The Family Law Committee will hold its next meeting on Thursday, May 3, 2007 at 8 am at the ABA International Law Section’s spring meeting in Washington, D.C.

To register to attend the section’s meeting, please go to the section website at www.abanet.org/intlaw. Please join us at the committee meeting! Additionally, the steering group is seeking items to include on the meeting's agenda. Please email the committee listserv at intfamilylaw@mail.abanet.org with items you would like to see included on the agenda. Once the agenda is finalized, prior to the committee meeting, the Steering Group will forward the agenda to the listserv for your review and comments.

NCMEC Mediation

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The National Center for Missing and Exploited Children (NCMEC) and the Department of State Office of Children's Issues will be hosting an invitation-only two-day training for experienced mediators in early September at NCMEC's headquarters in Alexandria, Virginia.

The training is geared towards mediators who have some interest in handling an international child abduction case pro bono. NCMEC has begun to increase its use of mediation as a tool in both Hague and non-Hague child abduction cases, and this mediation training will introduce experienced mediators to the ins and outs of NCMEC’s program, as well as information about international family law and the Hague Convention and how to handle unique issues related to this type of mediation (phone mediation, emotional issues, etc.). The training itself will also have some specific
information about a pilot program with Germany in handling these cases.

If you are interested in attending, please email me with your background in mediation (for example, what type of cases you handle, how many cases you have handled, what training you have).

At the current time, NCMEC and the State Department are only seeking highly qualified mediators to conduct these mediations, but will inevitably expand its program as interest grows. If your background fits with their current needs, I will gladly see to it that you are extended an invitation to attend.

UCCJEA Discrimination Against American Parents?

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Does the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) discriminate against American parents?

Read literally, it requires American courts to enforce custody orders of courts in foreign countries even if the orders are unfair or reprehensible and even if the foreign courts do not provide reciprocal enforcement of American custody orders.

Serious problems result from the fact that the UCCJEA’s exceptions to the obligation to enforce foreign custody orders are unduly limited. The author submits that the UCCJEA imposes an inappropriately heavy burden of proof on American-based parents; that courts should provide a liberal interpretation to the exceptions to the obligation to enforce; and that legislative intervention is required to solve the problem more permanently.

“Assisting ‘expat’ American parents around the globe, I confront almost daily the glaring discrepancy between the extensive protections that American courts provide to foreign parents and the failure of many foreign legal systems to provide any equivalent protection to American parents. Unfortunately, the UCCJEA was apparently drafted without adequate regard to that problem.”

Section 105 of the UCCJEA requires courts in every state that has adopted the standard form of the Act to enforce custody determinations of other countries if jurisdiction was in substantial compliance with the requirements of the Act, unless the foreign “child custody law violates fundamental principles of human rights.” This language directs the American courts to consider the law as written, rather than the law as it is applied in a foreign court. Since most foreign child custody laws are innocuous on their face, it means that an American court should enforce orders that apply such laws in a repugnant way.

Only New Jersey, New York and Connecticut have modified Section 105 to deal with this problem. New Jersey’s statute provides that, “A court of this State need not apply this act if
the child custody law of a foreign country violates fundamental principles of human rights or does not base custody decisions on evaluation of the best interests of the child.” (N.J.S.A. 2A:34-57(c); emphasis added). Connecticut precludes a court in Connecticut from enforcing a foreign decree if “such determination was rendered under child custody law which violates fundamental principles of human rights or unless such determination is repugnant to the public policy of this state.” (Conn. Gen. Stat. Sec. 46b-115ii). New York provides that “A court of this state need not apply this article if the child custody law of a foreign country as written or as applied violates fundamental principles of human rights.” (DRL Sec. 75-d(3); emphasis added).

Do members agree that this is a problem that should be corrected? Please contact me with your thoughts.

Child Support Convention

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The Hague Conference on Private International Law is considering a new convention on family maintenance. The drafting committee, under the authority of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance, in January of 2007 issued its preliminary draft. The purpose of the new convention is to ensure the international recovery of child support and other forms of family maintenance through the establishment of a system of co-operation between the contracting states. The main features of the draft as proposed include making applications available for the establishment of support orders, as well as providing for recognition and enforcement of family maintenance obligations across international borders.

The Hague Conference has made steady progress over the past seven-plus years towards establishing a new international convention on maintenance obligations. This year, a final “diplomatic session” will be convened to finalize the text of the convention. The end product, anticipated in late fall, will be the convention on which each country deliberates and decides whether to join.

The Hague Conference created the Special Commission “to examine the operation of the Hague Conventions on maintenance obligations and the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance and to examine the desirability of revising those Hague Conventions, and the inclusion in a new instrument of judicial and administrative cooperation.” The Special Commission recommended that a new international instrument be formulated for the establishment and enforcement of maintenance obligations, and that both child maintenance and spousal maintenance be included if a country so declares.

In May 2003, the Special Commission met, with 46 countries represented, many already parties to existing international maintenance conventions. As of January 2007, the Preliminary Draft Convention On The International Recovery Of Child Support And Other Forms Of Family Maintenance has been published and is available on the Hague Conference website at www.hcch.net.

The scope of the draft appears in Article 2. It applies to maintenance obligations arising from a parent-child relationship, for children under the age of 21, to include claims for spousal support when made in conjunction with claims for child support. Any contracting state may declare that it will extend application of the convention to any maintenance obligation arising from a family relationship, as long as another contracting state has similarly declared. The convention would also apply to claims by a public body, such as a state attempting to recover support payments for providing public assistance to a child because support was not being provided by a parent.

The convention as proposed consists in part of directives aimed at administrative cooperation, setting forth the role of a central authority and the means by which the application process will be facilitated. Use of the convention would be streamlined by the use of model forms and the electronic transfer of funds. Other provisions would allow a direct request to a competent authority in a contracting state, rather than one going through the central authority; and would protect personal information and require confidentiality and nondisclosure in accordance with the law of the requesting state. Applications are to be in the official language of the requested or enforcing state. Provisions are
included for the recognition and enforcement of foreign maintenance decisions, recognizing that such would chiefly be pursuant to the national law of the enforcing state.

Articles 15, 16, and 17 establish initial and modification jurisdiction, and provide bases for recognition and enforcement of foreign maintenance obligations. Some provisions, especially those that allow contracting states to make “reservations,” rather than accepting the convention in toto, reveal conflicting international notions of legal jurisdiction. Jurisdiction based on the creditor’s residence, while predominant in existing regimes, such as the Brussels approach, is antithetical to American-style models of due process, which focus instead on the debtor’s contacts in the host forum. The Uniform Interstate Family Support Act (UIFSA) exemplifies the latter approach. If a contracting state wishes not to permit creditor-based jurisdiction, or wishes to allow parties to agree to jurisdiction, then that country may make reservations exempting itself from provisions under Article 17 that otherwise would apply.

Canada, Mexico, Japan, New Zealand, Switzerland, and the United States have all submitted comments on the draft. Because creditor-based jurisdiction, in particular, conflicts with well-established U.S. constitutional law, the American comments in particular focus there. Aside from jurisdictional concerns, the U.S. opposes provisions that would put the cost of the central authority’s services beyond the reach of those who are most in need of support enforcement services. The American proposals also seek to make the convention understandable and usable by the many non-lawyer workers in the various IV-D agencies now functioning within the U.S.

Will the U.S. sign and ratify the convention? On the one hand, the American comments on the draft are extensive, and they challenge key provisions. Meanwhile, the U.S. continues to pursue reciprocal child support agreements with individual countries. On the other hand, it has been argued that the more extensive its bilateral contacts, the more likely the experience gained from those contacts will allow the U.S. to promote and enter into an effective and workable multilateral convention.

The next meeting of the Special Commission is 8-16 May 2007. Also, the National Conference of Commissioners on Uniform State Laws has created a drafting committee charged with proposing UIFSA amendments in light of the expected November 2007 completion of the new international convention on family maintenance.

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**International Prenuptial Agreements**

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The English courts are notorious for refusing to enforce prenuptial agreements. This creates extremely significant issues for attorneys drafting U.S. prenuptial agreements for ‘globetrotters’ such that disclosure of potential problems to parties to such agreements is highly recommended.

Two recent cases in England plus a case in the Isle of Man, which generally applies English law, indicate a slow but steady shift towards greater consideration of prenuptial agreements.

In A v A [2006] EWHC 2900 (Fam) Baron J said, “It is well known within the profession (and I take judicial notice of this) that the Courts have in recent times placed increasing weight on agreements made between parties after proper disclosure and full legal advice.” On its facts the Court did not hold the wife to the terms of the agreement but only because she had been subjected to undue pressure which had overborne her free will.

In Ella v Ella [2007] EWCA (Civ) 99 (16/1/07) the parties had married in Israel and shortly before the wedding had executed a prenuptial agreement which was likely to be enforceable in Israel, but which was open to criticism in England: among other matters the wife had not been independently advised. Despite the ‘defects’ alleged against it, the agreement played an important part in the Court’s decision staying the wife’s English petition on the basis that the appropriate forum was the Rabbinical Court of Tel Aviv where the husband had instituted proceedings.

A third case is a currently unreported decision from the Isle of Man (as to which this author has provided consultation for one of the parties) in which the “Deemster” opined that “The status in Manx and English law of such agreements has
changed and developed. The day will come when such are enforceable on the same basis as any other contract. That day is probably not far off, but for the present I have to consider the statutory framework, section 32 of the Matrimonial Proceedings Act 2003 and the agreements within that framework..."

Other jurisdictions, such as Singapore, Hong Kong and the Bahamas, tend to follow the English lead in such matters.

Prenuptial Contracts and Forms of Marriage in South Africa

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Whilst principles and processes involved in drawing up a prenuptial contract are pretty standard worldwide, their legal consequences, surprisingly, are not. In South Africa, until 1984, with the introduction of the accrual system through the Matrimonial Property Act ("the Act") a prenuptial contract could be entered into in order to modify or exclude community of property, as well as profit and loss and the husband’s marital power; to arrange marriage settlements between the parties or to provide for the succession of one spouse to the other, or of one or both spouses to a third party; or of a third party to one or both of the spouses.

Since the promulgation of the Act, two significant changes have occurred in this area of family law. Firstly, it is no longer necessary to exclude the husband’s marital power through a prenuptial contract. Regardless of whether or not the marriage is in community of property, there exists no marital power in marriages contracted on or after the commencement of the Act. Secondly, if the parties intend to exclude the accrual system, they are required expressly so to state. Anything that is not impossible, legal or contrary to public policy may be included in a prenuptial contract in South Africa. It requires no formalities, apart from being endorsed by a notary public and registered in a Deeds Registry in South Africa within 6 months after the date of execution or within such extended period as the court may allow. In South Africa, a prenuptial contract has to adhere to and be in accordance with the ordinary rules applicable to bone fide contracts. By accrual is meant the difference between the net value of a party’s estate at the time of the marriage and the value (subject to escalation) at the time when the accrual becomes operative which is on the termination of the marriage or when so ordered by a competent court.

There are three matrimonial regimes which are of application in South Africa. Very briefly, and very simply, they are (a) in community of property where one joint estate is created on marriage; (b) a marriage out of community of property where the separate estates are retained and which is not subject to the accrual; and (c) a marriage out of community of property which is subject to the accrual where the parties share in the accrual in the percentages that they agree at the time of the marriage. From the accrual can be excluded whatever the parties require provided this is stated at the time of the marriage and inheritances and donations are also excluded. The foregoing is, of course, putting the position very broadly and simply and, as always, there are exceptions and variations.

Regrettfully South Africa has a very high divorce rate, comparable with the highest rates in the rest of the world. It is therefore very important that the parties are properly, and independently, advised of their rights and obligations prior to entering into marriage.

Hague Child Abduction Convention

The Permanent Bureau of the Hague Conference has announced the successful conclusion of two pilot programs using a real-time electronic case management system known as iChild, which was developed specifically to help administer cases brought under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. The Child Abduction Convention is one of the most successful international treaties drawn up by the Hague Conference on Private International Law. 76 states are now parties to the Convention.

The Bureau is now encouraging all Central Authorities to implement the iChild software, which will help countries to improve their management of these important and sensitive cases, to communicate amongst each other, and to develop and report statistics critical to the monitoring process.
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