Committee Newsletter, September 2007

Editor: Jeremy D. Morley

HOT TOPICS

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COMMITTEE NEWS

By Melissa Kucinski

- Upcoming Committee Events

Thursday, October 4, 2007, 4:00 to 5:30 p.m.
London, England

CLE: International Family Law for the Globetrotting Executive

Join us at our committee CLE at the International Law Section’s fall meeting in London. Our CLE “International Family Law for the Globetrotting Executive” will be held from 4 until 5:30 p.m. at the Grosvenor House Hotel in the Devonshire Suite. All are Welcome.

Bring guests. The program will cover:

- International Prenuptial Agreements;
- Strategic International Divorce Planning;
- International Divorce Jurisdiction;
- Which Law Governs the International Divorce?
- International Child Custody and International Child Abduction.
- International Family Lawyers’ “Top Tips for the Globetrotting Executive.”

Thursday, October 4, 2007, 6:00 p.m.

Committee Dinner

Join us in London immediately after our committee CLE for an informal committee get-together. We will meet at 6 pm in the lobby of the Grosvenor House Hotel and then proceed to the Park Room in the hotel.

Friday, October 5, 2007, 8 to 9 a.m.

Committee Business Meeting

Our next in-person business meeting -- with breakfast -- will be held from 8 until 9 a.m. at the International Law Section’s fall meeting in London.

Tuesday, October 30, 2007, 12 noon, Eastern Time

Steering Group Conference Call

Our next Steering Group Conference Call. The last call was excellent. The next will be at least as good.

Join the Steering Group!
• Other Events of Interest

Monday, October 1, 2007
Secretary of State Advisory Council Meeting on Private International Law

This will be held at the Georgetown Law Center in Washington, D.C. One hour of the all-day meeting will be devoted to international family law (2:30-3:30 pm).

October 11 – 12, 2007

American Academy of Adoption Attorneys Mid-Year Meeting

The AAA will hold its Mid-Year meeting in Baltimore Maryland with a seminar titled International Adoption, after the Hague. Please visit www.adoptionattorneys.org for registration information and the agenda.

• Get Involved in Committee Work

If you are interested in volunteering for committee work, please email Melissa at mkucinski@dberlin.org for information on ongoing committee projects and programs that the committee needs help with.

• Committee E-newsletter & Our Listserv

This e-newsletter is published quarterly by our Steering Group, and we encourage all committee members to suggest topics or write articles. Please send your ideas, comments, or articles to Jeremy Morley, the e-newsletter editor at jmorley@international-divorce.com.

Our listserv is also a useful tool to discuss practice techniques and pose questions. If you have a case in a particular jurisdiction and have a question or simply want to discuss an issue with the committee, please send an email to the listserv at intfamilylaw@mail.abanet.org. Please remember to update your email address with the section staff if it changes.

NATIONAL COMMISSION ON UNIFORM STATE LAWS: NEW STUDY COMMITTEES

The National Commission on Uniform State Laws (NCCUSL) has approved two new study committees in issues important to child custody matters. The ABA does not appoint advisors to study committees; however, any comments your section may have on the subject matter should be forwarded to NCCUSL.


This committee will examine, at the request of the U. S. Department of State, whether becoming a party to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect to Parental Responsibility and Measures for the Protection of Children concluded in 1996 under the auspices of the Hague Conference on Private International Law is in the best interests of the United States and possible mechanisms for its implementation, including amendments to the Uniform Child Custody Jurisdiction and Enforcement Act.

2. Study Committee on the Hague Convention on Choice of Court Agreements.

This study committee will work with the U. S. State Department in connection with the implementation and ratification of the Hague Convention on Choice of Courts Agreement. The committee work will include consideration of the merits of ratification by the U. S., the effect of the Convention on U. S. law, the appropriate means for implementation, and whether any current uniform laws would need to be amended in light of the Convention.
PRACTICAL ASPECTS OF A MILITARY DIVORCE

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Any attorney who has decided to represent an active duty servicemember, a retired servicemember or the spouse of either an active duty or retired servicemember where one or both parties is living overseas will face certain pitfalls not normally experienced in a domestic civilian divorce.

The purpose of this article is to provide an attorney with the practical problems faced in an overseas military divorce concerning service of process and jurisdictional issues over the military pension, child custody and child support.

A. Service of Process: As my law school Civil Procedure professor used to say, “If you don’t have proper service you don’t have a case.” Service of process can be particularly vexing when dealing with an overseas military case. It cannot stress strongly enough the need for proper service. It does neither you nor your client any good to have your final judgment set aside due to lack of proper service. An attorney representing a defendant servicemember is not off the hook. One must insure that proper service has been made.

If you defendant is overseas you have some options as to service.

a. Voluntary Acceptance of Service. If the defendant wants the divorce as much as the plaintiff then he/she may be willing to accept service voluntarily. When drafting the acceptance of service it is good practice to mention the applicable treaty in the acceptance of service.

b. Formal Service. If your defendant is overseas and will not accept voluntary service he/she must be served under the appropriate treaty. If you try to cut corners by using a state statute that allows for service by publication you will not have made proper service. The only time an overseas defendant may be served by publication is when the address is unknown. Many attorneys think that because a defendant has a military postal address he/she may be served via certified or registered post. That is not considered proper service unless the country in which the defendant is located allows service in that manner. The particularities of the treaties and the signatories change on a fairly frequent basis. Therefore, your best resource for overseas service is the United States State Department website which lists all the service treaties and country requirements. Currently one may serve a defendant in Iraq or Afghanistan via the U.S. postal service.

One may want to think twice about serving a servicemember in a war zone. I won't do it unless the servicemember also wants the divorce, because I know of at least one case where the servicemember died as a direct result of receiving the service.

B. Jurisdiction. Jurisdiction in an overseas military case generally has four aspects: Jurisdiction over the military pension, jurisdiction over personal and real property, jurisdiction over child custody and jurisdiction over support. Jurisdiction over personal and real property will fall under United States state jurisdictional statutes. The pitfalls lie in jurisdiction over the military pension, child custody and child support.

1. Jurisdiction over the Military Pension. Jurisdiction over the military pension is controlled by federal statute; specifically Title 10 U.S.C. 1408, which states the requirements for jurisdiction over the military pension. Jurisdiction over the military pension can be compared to subject matter jurisdiction with the exception that the active duty or retired servicemember may waive the jurisdiction. Only a court of the United States and its territories may divide the military pension; no foreign court may divide the military pension.

a. Jurisdiction over the Active Duty Member’s Pension. In order to have jurisdiction over the military pension the follow requirements must be met:

(1) The military member cannot be resident of the state only due to military assignment, or

(2) The military member must consent to the jurisdiction of the court.
In order to understand what “The military member cannot be resident of the state only due to military assignment,” means, one must understand a peculiar aspect of military life. We all know that normally we are residents of the state in which we live. Even though, we were born and raised in State A and we still think of State A as home, we live in State B and that is where we are residents. But for an active duty military member that does not hold true. A military member is allowed to keep State A as his/her residence even though he/she is stationed (living) in State B. All states have statute provisions which state that a servicemember who has left the state due to military orders is considered actually in the state.

A servicemember’s residence may be the same his/her Home of Record, which is generally where the servicemember entered the service, or it may be that the servicemember has changed his/her residence to another state. The normal indicia of residency may not tell you. It is common for a servicemember to have a driver’s license in State A and real property in State B but be a resident of State C. So how does the practitioner know which state is the servicemember who has left the state due to military orders is considered actually in the state.

Consent or waiver to the court’s jurisdiction is fairly obvious. If the servicemember is the petitioner he/she has consented to the court’s jurisdiction. The pitfall lies with the attorney who represents a servicemember defendant. In order to preserve the jurisdiction the servicemember must invoke it; otherwise the servicemember has waived jurisdiction. Therefore, when representing a defendant servicemember make sure you know his/her state of residence.

b. Jurisdiction over the Retired Member’s Military Pension. Obtaining jurisdiction over a retired servicemember’s pension is not nearly as much of a problem as with the active duty servicemember’s pension. If the retired servicemember is living in the United States his/her state of residence is where he/she is physically located. However, many retired servicemembers work for the United States government overseas or live in an overseas area. If the retired servicemember is working for the US government overseas he/she retains residency in either the last state in which he/she lived prior to going overseas or in the state of residence he/she had while on active duty. The question is how does one know? If the retired servicemember lived in a state for at least six months after retirement then that state is probably the state of residence. If the retired servicemember either retired overseas or took an overseas position shortly after retirement look to the state in which he/she was resident on active duty. Let me give you a couple of examples:

- While Mary was on active duty her state of residence was in Kentucky. Her last duty station was in Georgia. Upon her retirement, Rather than moving back to Kentucky while looking for job she decided to remain in Georgia. However, she did not register to vote or apply for a driver’s license in Georgia and accepted a U.S. government position shortly thereafter. In this case one would look to, Kentucky, her state of residency while she was on active duty.

- While Jon was on active duty his state of residence was New York. His last duty station was in Virginia. Upon his retirement he applied for a driver’s license and registered to vote in Virginia. However, about six months after he retired he was offered a position with the US government in an overseas location which he accepted. His state of residency would be Virginia.

c. Jurisdiction over Child Custody.

Jurisdiction over a child for the purposes of custody in the United States is based on state law which is, usually, based on the UCCJEA. The problem arises when the child is overseas. However, the concept is the same as under the UCCJEA. Jurisdiction over a child is in the state or foreign country in which the child is habitually resident; the place the child has been physically located for the six months, prior to the filing. Child custody jurisdiction is subject matter jurisdiction, which cannot be waived. Addressing all aspects of child custody belongs in its own article. I will address some common pitfalls.

1. One may not bootstrap the parent’s state of residency for child custody. Just because the military parent has residence in State A does not give State A jurisdiction over child custody.
2. Citizenship has nothing to do with child custody jurisdiction. If the child is habitually resident in Foreign Country A then that court has jurisdiction over child custody. It doesn’t matter that the child is a US citizen.

3. This bears repeating; one may not waive or submit to the jurisdiction of a court for the purposes of child custody. Jurisdiction over one party has nothing to do with jurisdiction over the child. It is just too bad for you that the child has been in Foreign Country A for six months prior to the filing or the child was born in foreign country A and is still there. Your state does not have jurisdiction.

What can you do? Your client can either apply to the foreign court for a custody order -- some foreign courts are more user friendly than others -- or if the parties are civil, they can agree to a parenting agreement. If the parties can agree to custody I use a parenting agreement option; although it is not an order, it is enforceable under contract law.

d. Jurisdiction over Child Support.
Jurisdiction over child support is personal jurisdiction over the parent paying the support; not the child. Again, easy enough if you’ve got everyone in the same place or can use a state long arm statute, or even if the non-custodial parent (NCP) relocates to State B.

But what do you do when you represent the custodial parent (CP) in a state with which NCP has no connection and NCP goes to an overseas assignment. This is where the military member’s state of residence can work to your benefit. The servicemember’s state of residence always has personal jurisdiction over the servicemember. Therefore, even though NCP is overseas CP can file for child support in NCP’s state of residence.

Miscellaneous Pitfalls

1. Don’t use the life insurance provided offered by the government to the servicemember as insurance for child support. There is no provision under the federal statute that governs the life insurance to allow for enforcement if the servicemember decides to change the beneficiary.

2. Do become familiar with the new Servicemember’s Civil Relief Act (2003) (SCRA). There is a Judges’ Guide in the Military Section of the ABA Family Law website.

3. As the SCRA is new, use the cases for the old Soldiers’ and Sailors’ Civil Relief Act.

4. Remember that the military pension is divided under state law. There is no federal statute mandating how the pension is to be divided.

5. The 10-Year Rule applies only to whether the non-military spouse is eligible to receive his/her share of the pension from the military finance department. It is not a threshold for eligibility for the pension division.

6. When drafting a visitation schedule take into consideration overseas and out of state visitation and draft appropriately.

7. If the servicemember is close to retirement and your state allows it, draft a re-calculation of child support to be accomplished at the time of retirement.

South Africa: NEW CHILDREN’S ACT
Karen Holman
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New legislation has been enacted in South Africa with the introduction of the new Children’s Act, certain provisions of which were enacted on 1 July 2007. This Act brings with it a wave of changes in respect of, inter alia, the age of majority of children in South Africa, as well as the rights of unmarried fathers.
There are huge benefits for unmarried fathers, who, in the past, faced great obstacles to obtaining access to their minor children if the mothers refused to grant them access to their illegitimate children. In terms of the previous Natural Fathers of Children born out of Wedlock Act, an unmarried father could only obtain rights of custody, guardianship and access with the leave of the High Court. The new Children’s Act makes it clear that, if the unmarried father was at the time of the child’s birth living with the mother in a permanent life partnership, the unmarried father now automatically acquires full parental rights and responsibilities. The parental rights and responsibilities of both the unmarried mother and the unmarried father are now on an even keel.

The new Children’s Act defines parental rights and responsibilities as follows:

- the care of the child (previously termed custody);
- to maintain contact with the child (previously termed access);
- to act as guardian of the child;
- to contribute to the maintenance of the child.

The Act goes further in that it now provides for mediation if there is a dispute between the biological father and the biological mother of an illegitimate child with regard to the fulfillment by the father of the conditions as provided for in the New Children’s Act, namely, whether if at the time of the child’s birth a father was living with the mother in a permanent life partnership or, regardless of whether or not he has lived or is living with the mother, consents to be identified as the child’s father, contributes or is attempting to contribute to the child’s upbringing for a reasonable period, and contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period. If such a dispute exists, the new Children’s Act provides for the dispute to be referred for mediation to the Family Advocate, a social worker, etc.

Previously in South Africa, the age of majority of a child was 21 years. The new Children’s Act provides that the age of majority for children is now 18 years. The implications thereof are that a child who has turned 18 years of age may, inter alia, contract without the assistance of a guardian and/or parent, may procure and sell property in his/her name without the assistance of a guardian and/or parent, and may even marry without the consent of a guardian and/or parent.

The new Children’s Act is quite clear that notwithstanding the provisions contained therein, including the acquisition of full parental rights and responsibilities by unmarried fathers, in all matters concerning the care, protection and well-being of the child, the standard of the child’s best interests is of paramount importance and must always be applied.

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URGENCY REQUIRED IN CHILD ABDUCTION CASES

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The English courts -- unlike the courts in many countries, including in many situations the United States -- insist that child abduction cases are resolved expeditiously.

In the European Union, following the entry into force of the Brussels II bis Regulation, there is now an obligation that the entire process of child abduction cases be completed within six weeks. Indeed, the European Commission has suggested that to guarantee compliance return orders might be enforced pending appeal, see Practice Guide for the application of Council Regulation (EC) No 2201/2003. The English Court of Appeal came down strongly on this issue in In re M (Child abduction: Delay). In its ruling dated July 31, 2007, the Court insisted that courts, judges and lawyers need to be aware of the pressing time limits in cases involving allegations of child abduction. The court of trial had to complete the process within six weeks and once a judgment had been sent to counsel in draft, there should only be a brief period in which to draft the consequential order.

For this reason, the Court of Appeal (Lord Justice Thorpe, Lord Justice Collins and Lord Justice Toulson) refused to grant permission to appeal to the father against the dismissal by Mr Justice Sumner of his application under

The originating summons had been issued on April 4, 2007. The judge heard the case on May 21, 2007 and elected to put his conclusions in writing which were emailed to counsel on May 25. However, Lord Justice Thorpe said that it was quite unacceptable that the sealed order giving expression to that judgment was not dated until June 21. He insisted that to waste a whole month in the timescale of a Brussels II case was completely unacceptable, and that counsel needed to understand that once judgment was with them in draft, there should only be a brief period in which to draft the consequential order.

It is to be hoped that the lesson of this case is heeded in other jurisdictions.

STATE DEPARTMENT’S 2007 HAGUE COMPLIANCE REPORT

Jeremy D. Morley

The U.S. Department of State has issued its 2007 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction. The Report focuses its attention on those countries that the State Department deems to have been noncompliant during 2006 with the obligations of the Hague Child Abduction Convention and those countries that are "Demonstrating Patterns of Noncompliance."

Only one country, Honduras, made the list of Noncompliant Countries. The basis for the finding is that (a) Honduras does not have a functioning Central Authority; and (b) the handling of cases in the Honduran courts is unreliable. In one “particularly disastrous” case during FY 2006, the courts ordered the return of abducted children but when the left-behind mother traveled to Honduras to pick them up at the courthouse, their whereabouts are unknown and the Honduran courts have refused to find the father in contempt of court.

Seven countries are on the list of countries demonstrating patterns of noncompliance. These are:

1. Brazil – because of extreme delays and because the Brazilian judiciary often treats return cases under the Convention as custody determinations.

2. Chile – because cases handled by the Chilean judiciary are most often treated as custody cases and because in making these custody decisions, the courts demonstrate clear bias toward Chilean mothers.

3. Colombia – because the Colombian Central Authority insists on conducting a “best interests” analysis prior to requiring a return and because children are deemed to have become “settled” in Colombia after parental stalling.

4. Germany – because of the unwillingness of some courts to enforce orders for the return of children, or access to children, under the Convention.

5. Greece – because Greek courts typically treated Convention cases as custody matters, exhibited a bias in favor of Greek parents and allowed excessive delays.

6. Mexico – because of an inability to locate abducted children taken to Mexico as well as abuses of the *amparo* system (a special appeal in Mexico claiming a violation of constitutional rights that has been used by taking parents to block Hague proceedings indefinitely).

7. Poland - because of ineffective law enforcement in locating children and in enforcing the return of children or access to children under the Convention.
REQUEST FOR INTERVIEWS WITH BATTERED WOMEN & ATTORNEYS

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Practitioners who have litigated Hague Abduction Convention cases know that many are filed because the respondent, most often a woman, and the children are fleeing domestic violence. There is no domestic violence defense articulated in the convention (with the limited exception of Article 13(b)), an absence receiving much commentary and scrutiny. See: Using Article 20, by Merle H. Weiner, PhD, Family Law Quarterly Vol 38 No 3 Fall 2004.

Jeffrey Edelson Ph.D, Director, Minnesota Center Against Violence & Abuse, Professor and Director of Research, School of Social Work, at the University of Minnesota, oversees a research effort funded by the Department of Justice to interview formerly battered women, who have had to respond to Hague Abduction Convention petitions. This is information gathering research, and is conducted with confidential protections.

The project seeks to interview about 25 respondents, and their attorneys and possibly the judges involved. There is a stipend for the interviewees. Detailed information can be found at their website, http://www.haguedv.org.

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