Committee Newsletter, December 2007

Editor: Jeremy D. Morley

HOT TOPICS

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⇒ Committee News
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⇒ Department of Justice Canada Website
⇒ Notarial Divorces in France?
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⇒ Mahr – Islamic Marriage Contract – Held to be Not Enforceable

The Committee in particular focuses on the development or enforcement of multilateral conventions governing these family law questions. The Committee includes practitioners working in the field of international family law as well and academics and policy makers interested in this emerging area of practice.

COMMITTEE NEWS

By Melissa Kucinski

• Participation in the Committee

If you are interested in joining the ABA International Law Section’s Family Law Committee, please contact Melissa at mkucinski@dberson.org, or Jeremy at jmorley@international-divorce.com for information. We have a distinguished membership from around the globe, and are always seeking new members.

If you want to participate in the activities of the Family Law Committee, please let us know, and we can talk to you about your interests and ideas and discuss our current projects with you.

Please review the Committee’s newly updated website at www.abanet.org/intlaw. You may provide feedback on its content, format, and usefulness by emailing Melissa.

The Steering Group will hold its next conference call on January 15, 2008 at 12 noon eastern time. If you want to participate, please email Melissa to receive dial in instructions.
We welcome the ABA Family Law Section’s International Law Committee, who will be receiving this newsletter in December. We look forward to coordinating with you on future projects.

- **The Year in Review Article**

  On behalf of the Committee, Professor Bob Spector and Brad Lechman-Su have written an outstanding *Year in Review* article on International Family Law, 2007.

  The article is a must-read for all international family law practitioners.

  It focuses on:

  - The successful completion of the negotiations for a Hague treaty on child support and other forms of family maintenance.
  - The Hague service convention.
  - The Hague adoption convention.
  - New case law concerning the Hague abduction convention in the areas of:
    - Habitual residence;
    - Rights of custody
    - Actual exercise of custody rights
    - Defenses
  - Custody Jurisdiction.

You can read the article through the link on our Committee website, http://www.abanet.org/dch/committee.cfm?com=IC942000

- **Committee Program at New York City Meeting**

  Friday, April 4, 2008 10:30 am - 12:00 pm
  Grand Hyatt Hotel, New York City

  **CLE: “Counseling Business Clients Regarding International Family Law Issues”**

  Join us at our Committee Program at the International Law Section’s fall meeting in New York.

  Our CLE program is entitled “International Family Law for the Globetrotting Executive” and will be held from 4 until 5:30 p.m. at the Grand Hyatt Hotel. All are Welcome.

  **Program theme:** Globetrotting business people often require urgent assistance with international family law issues. The explosion of cross-global marriages and international custody disputes create great risks for the international business community. This program will alert the international business practitioner to current issues in international family law that their clients may encounter, with an overview of strategies, problem prevention, and solutions. Three international areas will be explored:

  (1) Children's issues;
  (2) Divorce; and
  (3) Advance planning to avoid disasters.

  **Program Co-Chairs:**

  Linda Shay Gardner (Speaker), Gardner Law Offices, Bethlehem, PA

  Jeremy D. Morley (Speaker), International Family Law, New York, NY

  **Moderator:**

  Melissa Kucinski, Bulman, Dunie, Burke & Feld, Bethesda, MD
• Committee Breakfast at New York City Meeting

Our next in-person business meeting -- with breakfast -- will be held during the International Law Section's Spring meeting in New York City, April 1-5, 2008.

• 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.

Sweden: CHILD ABDUCTION CASES IN SWEDEN - New custody law is influencing abduction cases

Jessica Sandberg
(jessica.sandberg@alwaadvokat.se)

Sweden’s new Family Law Act, in place since July 1, 2006, has led parents who are defending Hague Convention child abduction claims in Sweden to argue that the new law allows abduction cases to be treated as custody cases.

The new law stresses more strongly than its predecessor that the child’s own will should be taken into consideration in a much stronger broader perspective. The new act removed the age limit from hearing children from the age of 12 to no age limit. A consequence in custody cases is that the social service agencies have in some cases interviewed children as young as five years old.

Before a child abduction case is instituted in the Swedish court, the court first requests the Swedish social services to interview the abducted child in order to report back to the court the child’s own wishes.

Even though in an abduction case the child’s own will should not be stressed in the same way as in a traditional custody case, the Swedish social services sometimes believe that it is their mandate from the court to interview the child in exactly the same way in a child abduction case as in a custody case. This happens very often when a parent who has abducted a child fights strongly to keep the child in Sweden, accompanies the child to social services for the interviews, has separate discussions with the social workers, provides them with particular information in order to justify the abduction and uses arguments under the new custody act as to why the child should not and does not want to be sent back and why the child’s wishes even if it is very small should be considered.

Sometimes the investigators who have interviewed a child are permitted to appear in court to further explain the child’s own will in the child abduction hearing. The hearings in many cases lead to a deep discussion and interpretation of the child’s own will, even in cases where the child is very young, in ways that have been opened up by the new Family Law Act but which are questionable under the convention.

Fortunately in most cases the final orders from the courts have been in accordance with the principles of the Convention and regulations, even if the hearings and interviews with the child have been in accordance with a traditional custody trial.
This is an introduction to family justice material on the Department of Justice Canada’s Website, canada.justice.gc.ca. Our main page provides a direct link to three websites: Child Support, Family Violence and Parenting After Divorce. Here’s an example of what you’ll find on each site:

**Child Support**

On the Child Support page you will find direct links to the Federal Child Support Guidelines. These guidelines apply in divorce cases (pursuant to the Federal Divorce Act). Provinces and territories have adopted the same or very similar guidelines to apply in cases other than divorce cases. Note that the province of Québec has different child support guidelines.

The site contains links to our public legal education and information material such as the publication: The Federal Child Support Guidelines: Step-by-Step (2006) and our Family Justice Newsletter. It also gives a direct link to the latest family justice publication: What happens next? Information for kids about separation and divorce. This booklet was developed as part of a strategy to help children through their parents’ separation and to help them to express their thoughts and concerns and voice their questions.

You will also find links to a long list of interesting family law research and reports, including data on the National Longitudinal Survey of Children and Youth, the 2002 Report to Parliament on the first five years of the Guidelines and resources such as the Inventory of Government-based Family Justice Services, which provides an overview of services to support families through separation and divorce across Canada.

There is a wealth of information on the enforcement of orders, including links to the provincial and territorial maintenance enforcement programs and a list of countries with which provinces and territories have reciprocity.

A link is also provided to pages related to family justice on the Canada Revenue Agency site.

**Parenting After Divorce**

The page on Parenting After Divorce contains some of the same links found in Child Support, and also has a link to Resources for Children, which is a user-friendly database listing over two hundred Canadian, U.S. and international resources in the area of separation and divorce. This database allows people to explore various products such as books, workbooks, videos, websites and games developed for children.

There is also a section “for parents” where a wide range of links are provided including some to other government resources such as:

Because Life Goes On... Helping Children and Youth Live with Separation and Divorce: A Guide for Parents, a popular Health Canada publication which can help parents better understand the needs of their children at different ages and stages;

International Child Abductions: A Manual for Parents, a publication by the Department of Foreign Affairs and Internationals Trade.

**Family Violence**

The Family Violence page is a great source of information on the role of Department of Justice in the Government of Canada’s Family Violence Initiative. You will find statistics on the extent of family violence in
Canada as well as fact sheets on various topics such as Spousal Abuse; Child Abuse; Abuse of Older Adults; Dating Violence and Sexual Abuse and Exploitation of Children and Youth.

There is also a link to a great new website for kids. There are two portals – one with information for children aged 10 to 12 and another for youth 13 and up – with a list of options on where they can turn to for help and includes links to the Kids Help Phone and similar international sites.

This is by no means an exhaustive list of what you’ll find when you visit us at www.canada.justice.gc.ca but I hope it piques your interest enough to convince you to visit us!

Notarial Divorces in France?

Our colleagues in France are extremely concerned about a proposed new law in France that would allow amicable divorces to be carried out by notaries. Lawyers’ strikes are threatened!

Here are the views of two of our members in France:

Olivia Sigal:

The bar associations are protesting that the spouse in the weakest position will be forced into an “amicable” procedure.

We are also trying to explain that in most cases it’s the work of the attorneys that has allowed the parties to come to a reasonable agreement on all the hot topics such as child custody or division of property but the only echo the protest gets in the news is that we are afraid of losing a very lucrative activity.

Curiously no journalist has yet thought that unless there is no money and no children involved, the parties will still need guidance from an attorney, and even in those cases what could possibly be saved in lawyer’s fee will be spent in Notaire’s fees since we doubt that they will do that type of work for free.

Ronald Sokol:

The idea of taking uncontested divorces entirely out of the judicial system is not a bad idea and could represent the future of a family system which throughout Europe is in a state of accelerated evolution.

The simplest way to escape the judicial system is not to get married, which is already the path followed today by most young people in France. Pushing uncontested divorces out of the judicial system into the notarial system - for which there is no US equivalent - is simply moving the cases from a system which is essentially free to one that is government regulated but permitted to charge for its services. Whether it will improve the lot of the dissolving couple is by no means certain. That does not seem to be the perspective of the bar which is concerned about its economic well-being. Most French lawyers outside of Paris are sole practitioners and sometimes as much as 50% or more of their caseload consists of divorce cases. Their economic base is fragile.

Thus, the proposed change is causing a lot of static among members of the French legal profession, and it is only fair that those of you outside of France should get to hear some of the harsh music.


Basically, the states that ratify the convention agree to assist citizens from other states who have also ratified the convention to recover child support.

The United States immediately signed the Convention, the first (and, thus far, only) State to do so.

The following are some extracts from the press release that was issued at the beginning of the Diplomatic Session:

"A new Convention...designed to respond to the needs of children and other dependents by providing international procedures which are simple, swift, cost-effective, accessible, and fair.

Unpaid child support – as well as support of other dependent family members – amounts to billions of Euros worldwide. When the person liable for support lives abroad, the difficulties of recovery are often insurmountable. At present, international procedures are typically slow, complicated, costly, and under-utilized. They are simply not serving the needs of the children and other family dependents who, in a mobile world in which multinational families are no longer exceptional, are increasing in number exponentially. The new Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance is designed to respond to the often modest needs of children and other dependents by providing international procedures which are simple, swift, cost-effective, accessible, and fair."

Korea’s New Family Registration Law

The South Korean Supreme Court has issued details of its implementation of the new family registration law, which will take effect on January 1, 2008. The new system will replace the traditional “hoju” system, which the Constitutional Court in Korea declared unconstitutional as violating the right to gender equality.

The current hoju system places only a male member as the legal head of the family with all family members listed under the hoju. The status of each family member is defined in terms of his or her relationship to the hoju. When a husband dies, he is usually succeeded by his first son, not by his wife. When a daughter gets married, she is removed from her father’s hojeok - family register - and transferred to her husband’s. Children are automatically added to the father’s hojeok. Even when a couple divorces and the mother retains custody of children, the children keep the father’s surname and remain in his hojeok unless he gives permission to transfer. A family without a son naturally means the end of a lineage.

Under the new system, the core concept of a hoju will be discarded, as will the hojeok. Every family member will be registered under his or her own new individual record book, which will contain information on the person’s birth, death, marriage and adoption, along with basic information on his or her spouse, parents and children. The new registration system will allow offspring to use the name of the mother with the mutual agreement of both parents at the time of marriage registration. It also will enable a child to change his or her surname in accordance with the stepfather and with court permission, even without agreement from the biological father. Also, extramarital offspring registered under the mother with the mother’s family name will no longer be obliged to move to the father’s registration or change his or her surname in accordance with the father.

Until now, adopted children and stepchildren had no rights to inheritance and certain rituals, called jesa, of honoring deceased parents. Upon the effective date of
the new law, stepchildren will have the same legal rights as the stepfather’s biological children, following the family name of the legal father and registered as such, when the mother and father are married for over one year. A person adopted by a couple married for over three years will also have the same legal rights on condition that the biological parents agree. Anyone under the age of 15 will be eligible.

While the new system is expected to greatly enhance the right of Korean females, the public is bracing for confusion as it will have far-reaching influence on both family life and the nation’s concept of a family.

**Mahr – Islamic Marriage Contract – Held to be Not Enforceable**

Jeremy D. Morley

An Ohio court has reportedly ruled that a promise made as part of a mahr – a dowry gift given by the groom to his bride upon an Islamic marriage – could not be enforced at law.

**The Ohio Case**

The case in Ohio stemmed from the marriage of a Muslim couple – the bride living in Ohio and the groom from Ireland. The bride’s father and the groom agreed on the terms of the mahr contract immediately before the marriage. Pursuant to the written one-page marriage contract, the groom gave his wife as a dowry a gold bracelet, a ring and a promise of a $25,000 payment. Less than two years later, the marriage was over.

In court, the wife argued that the mahr should be considered as a prenuptial agreement and the bride demanded enforcement of the promise to pay $25,000. Judge Dana S. Preisse in Common Pleas Court, Domestic Relations, Franklin County, Ohio refused to do so. She ruled that because “the obligation to pay $25,000 is rooted in a religious practice, the dowry is considered a religious act, not a legal contract. She held that a prenuptial agreement must be entered into without duress or coercion. In this case, she said, the agreement was made just a few minutes before the wedding ceremony, and the husband did not have time to consult an attorney. Furthermore, a prenuptial agreement is designed to protect a person’s assets in the event of a divorce. By contract, the mahr was designed to give the wife money in addition to whatever assets she owned, so that it could not be considered a prenuptial agreement.

Other Cases

Cases concerning mahr agreements – some domestic and others entered into overseas – have been litigated in several U.S. courts. The agreements have occasionally been upheld but only when presented as a simple contract and not as a prenuptial agreement. The distinction and application of the principles is well illustrated by two New Jersey cases.

In **Odatalla v. Odatalla** 810 A.2d 93 (N.J. Super.Ch. 2002), the Superior Court of New Jersey stated: “Why should a contract for the promise to pay money be less of a contract just because it was entered into at the time of an Islamic marriage settlement?” The court found that under the doctrine of “neutral principles of law,” it could enforce the agreement's secular components – specifically a promise to pay $10,000. The wife presented the parties’ wedding video showing two families negotiating the terms as an imam prepared the document, which everyone read before signing. The judge concluded that it was “nothing more and nothing less that a simple contract between two consenting adults. It does not contravene any statute or interests of society.”

By contrast, in **Attia v. Amin**, New Jersey Ch. Div., June 12, 2006, the court is reported to have held that the requirements of a valid contract had not been met since the amount of the payment was inequitable and the defendant had signed the agreement under duress, fearing that, if he did not do so, the marriage would not take place and that he would be deported. In an interesting additional argument, the court reportedly relied on testimony of the husband’s expert witness that a mahr is valid only if the wife is not more than 50 percent at fault for the divorce. The judge held that since the wife had made false charges of terrorism against the husband and...
had even called the FBI against him she was more than 51 percent at fault, which voided the mahr.

So When is a Mahr Enforceable?

Clearly a mahr is not a prenuptial agreement as that term is understood in American law and as understood through most of the world. It does not resolve the financial obligations between spouses – even parties to a Muslim marriage – under the civil law under American law. But it might create a claim to a specifically agreed sum of money if it constituted a valid contract.

Finally it should be noted that the Ohio case has prompted the imam who married the couple to change how he performs weddings. It is reported that from now on, he will make the husband sign a promissory note for the mahr, as well as the marriage contract, in order to make the promise more enforceable in the civil courts.

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