Committee Newsletter, June 22, 2007

Editor: Jeremy D. Morley

Hot Topics

› Committee News
› Help for Victims of Domestic Violence Residing Abroad
› Rights of Custodial Parents to Remove a Minor Child from the Republic of South Africa
› Enforcement of the Federal Affidavit of Support
› New Jersey Child Relocation to Japan
› Committee Steering Group

Committee News

By Melissa Kucinski
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• Spring 2007 Committee Meeting Wrap-Up

The Family Law Committee held a meeting on Thursday, May 3, 2007 as part of the International Law Section's spring meeting in Washington, D.C. During the meeting, committee members received an update on the Adoption Convention from Miki Stebbing of the State Department. Additionally, members discussed proposing a roundtable program to be held at next year’s spring meeting and discussed various treaties and conventions that the committee could propose that the section support through a resolution. Meeting minutes were circulated to the committee listserv, and any committee member who wants to volunteer his or her efforts or comment on the meeting should e-mail the listserv at intfamilylaw@mail.abanet.org.

The next in-person committee meeting will be held in October 2007 in London, England as part of the International Law Section’s fall meeting.

• Website Update

After circulating a draft of the committee’s proposed new website, Melissa Kucinski will begin working with section staff to update its contents. If anyone would like to volunteer to help update the committee’s website, please email the listserv at intfamilylaw@mail.abanet.org.

• Steering Group Update & Next Conference Call

The committee’s Steering Group has been holding monthly conference calls to discuss issues of programming, membership, the website, this e-newsletter, the listserv, and other goals that the Section requests that each committee aspire to accomplish.

If you are interested in becoming a member of the committee’s Steering Group, please send an email to the listserv at intfamilylaw@mail.abanet.org expressing this interest.

The Steering Group’s next conference call will be held on Thursday, June 28, 2007 at 3 pm Eastern Time. If you are interested in participating, or just listening in, please email Melissa Kucinski at mkucinski@schwartzlawpllc.com for dial-in instructions.

All are welcome.
• **CLE in London in October 2007**


In addition to our next in-person committee meeting, Jeremy Morley is producing a CLE program entitled “International Family Law for the Globetrotting Executive” on Thursday, October 4, 2007 from 4:00pm to 5:30pm at the Grosvenor House Hotel, Park Lane, London, England.

**Description of London Program:**

Complex international family law issues are an occupational hazard for globetrotting executives. International travel is great for business and pleasure but terrible for marital stability. A globetrotter’s legal adviser is expected to have hard data and brilliant strategic advice at the ready but in the real world accurate information and useful “big picture” advice is hard to find.

In this fast-moving program, some of the world’s leading experts on international family law will provide practical, useful and straightforward advice concerning:

- 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.”

All are welcome.

• **CLE Proposal for April 2008**

The International Law Section will be hosting its spring 2008 meeting in April 2008 in New York City, and while this is nearly one year from now, our Steering Group is beginning a proposal for a CLE program.

Initial ideas for the program involve a roundtable “hot-tip” format that would allow the majority of the international law section, who have less experience in family law issues, the opportunity to gain some insight and perspective into this particular field. This format would also allow the more seasoned practitioners to provide their “tips” to other practitioners and learn from one another.

Please email your ideas and suggestions for this program to the listserv at intfamilylaw@mail.abanet.org.

• **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.
Help For Victims of Domestic Violence Residing Abroad

Bradley C. Lechman-Su  
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This article will introduce the American Domestic Violence Crisis Line (ADVCL) to international practitioners.

The mission of ADVCL is to assist "American women overseas in making informed decisions about the abuse in their lives and in the lives of their children through intervention and education."

It offers access to support services and programs that allow women to establish "violence-free and economically feasible lives when they make the decision to return to the United States with their children."

This is a service for American women, civilian or military dependent, living abroad who are victims of domestic violence and who in particular are not able to break out of the situation due to economic vulnerability or cultural barriers. ADVCL also serves male victims and victims in same-sex relationships.

ADVCL accomplishes its goals by outreach, safety planning and support services.

Outreach is accomplished by the domestic violence victim becoming aware of the existence of the ADVCL resource and making a confidential contact by an international toll-free hotline, message, facsimile, email or regular mail. The toll-free line can be accessed from 175 different countries.

Once contacted, an ADVCL advocate works closely with the domestic violence victim to devise a safety plan for the victim and children. The safety plan includes how to protect against further violence or reduce the extent of the violence, gather evidence, and access resources in the victim’s country of residence.

Safety planning can also include including leaving the abuser and seeking safe haven.

If the victim chooses the option of leaving the country where the abuser is located and returning to the United States, ADVCL workers can help the victim secure resources including emotional support, professional counseling, safe housing, emergency financial support, legal assistance and resettlement and financial self-sufficiency programs.

ADVCL is a nonprofit organization (IRC 501(c)(3)) that receives no governmental funding. It relies on monetary contributions. Many of its activities and services are provided by trained volunteers. In 2006, ADVCL received 1,286 crisis calls and emails from 258 families in 47 countries. One airline, Virgin Atlantic, has provided deeply discounted fares to families relocating with the assistance of ADVCL.

Volunteer crisis line advocates provided information, professional volunteer counselors provided counseling to battered women, attorneys provided consultation on numerous cases and other volunteers provided web development, business consultancy, fund raising, outreach and general support.

The ADVCL number is toll-free internationally by calling the local AT&T operator from the country of residence and asking to be connected to 866-USWOMEN, nationally, to help one overseas, dial 1-866-USWOMEN.

The advocates are available on the international toll-free crisis line from Monday 9:00am continuously through Friday 11:00pm, Pacific Standard Time. Safe email access: crisis@866uswomen.org.

To volunteer, contact Whitney Zeigler, Crisis Services Coordinator at whitneyz@866uswomen.org or 503-203-1444. Visit their website at www.866uswomen.org.
Rights of Custodial Parents to Remove a Minor Child from the Republic of South Africa

Karen Holman
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In South Africa, in terms of the Guardianship Act 12 of 1993, a woman shall be the guardian of her minor children born out of a marriage, and such guardianship shall be equal to that which a father has under the common law in respect of his minor children.

Both parents, therefore, share joint guardianship of legitimate minor children during the subsistence of the marriage. Whilst either parent may exercise different aspects of guardianship independently of each other, certain aspects require the consent of the other parent, namely:

(c) the removal of the child from the Republic by one of the parents or by a person other than a parent of the child;

Whilst both parents share joint guardianship of minor children born of a marriage, upon divorce, both parents may not necessarily be awarded custody of the minor children. It is important to note that custody (whether sole or joint) does not entail the right of the custodial parent, outside of leave from the High Court, to remove the child from the Republic. This right flows from their right as guardians of the minor child. The consent of both guardian parents is required.

The inherent rights of divorced parents as joint guardians of minor children born of a marriage are very different from the rights of parents of a minor child born out of wedlock. Presently, the mother of a minor child born out of wedlock is the sole custodial parent and guardian of an illegitimate child. The father is not, ex lege, a custodial parent, and neither is the father, ex lege, a guardian of the illegitimate minor child. A father of a child born out of wedlock may, upon application to the High Court, be awarded joint custody and joint guardianship (as well as access rights) of his illegitimate minor child. The Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 provides for the possibility of access, custody, and guardianship of minor children born out of wedlock by their natural fathers.

[It should be noted that the Natural Fathers of Children Born Out of Wedlock Act will be repealed in its entirety by the proposed Children’s Act, the date of commencement of which is still to be proclaimed. In terms of the proposed Children’s Act, the natural unmarried father of a minor child will acquire full parental responsibilities and rights in respect of the minor child in certain circumstances without having to make application to Court. The proposed Children’s Act defines parental responsibilities and rights to include: to act as guardian of the child and to consent to the child’s departure or removal from the Republic.]

Under the current legislation, whilst the consent of the natural father is not required for the mother, as sole guardian of the illegitimate minor child, to remove the minor child from the Republic, this does not preclude the natural father from protecting his rights of custody and access to the illegitimate minor child. A natural father of an illegitimate minor child who has been awarded joint custody and access rights in terms of the current legislation may approach a Court to protect his custodial and access rights.

In deciding whether relocation or removal of the minor child from the Republic by the custodial parent is in the best interests of the minor child, the Court considers several determining factors, such as the views of the minor child (a factor which is contained in article 12 of the United Nations Convention on the Rights of the Child).

The Courts will not lightly interfere with the decisions of a custodial parent, but of paramount importance in making any such decision are the best interests of the minor child, a right which is enshrined on our constitution.
Enforcement of the Federal Affidavit of Support

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A New York appellate court has ruled that a person who signs a USCIS Form I-864 Affidavit of Support, promising to provide support for a sponsored immigrant, can be sued privately to enforce the promise. Moody v. Sorokina, 2007 NY Slip Op 00947.

A Ukrainian national immigrated to the United States to marry. Following the marriage, her husband executed a support affidavit agreeing to support his wife at or above 125% of the federal poverty line. When the husband later filed for divorce, his wife sought to enforce the affidavit for the purpose of determining the husband’s support obligation. The Appellate Division found that the statute expressly permits the sponsored immigrant to bring an action to enforce the affidavit of support against the sponsor in any federal or state court. Although the case involved spouses, the court’s reasoning may well be extended to anyone who sponsors an immigrant with an Affidavit of Support.

New Jersey Child Relocation to Japan

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The Supreme Court of New Jersey has unanimously upheld a decision allowing a Japanese mother to relocate with her six-year old child from their home in New Jersey to Okinawa, Japan over the strong objections of the American husband.

The primary concern of the husband was that the provisions for his visitation with his daughter were unenforceable in Japan. MacKinnon v. MacKinnon, Supreme Court of New Jersey, June 11, 2007.

It is submitted that the ruling should be understood strictly in the context of its specific facts and as being based on the limited evidence with which the courts were presented. The decision does not stand for the (false and extremely dangerous) proposition that Japan recognizes or respects foreign custody orders or rights of visitation.

In particular, it is important to note that the courts below were not presented with any expert evidence concerning Japan’s failure to enforce foreign or domestic custody and visitation orders, or as to its failure to recognize foreign custody orders or even any right of parental visitation.

The father relied primarily on the fact that Japan was not a party to the Hague Convention on the Civil Aspects of International Child Abduction. The Court upheld the ruling of the courts below that simply because a country has not signed the Convention should not automatically bar relocation to that country. The father also submitted a U.S. State Department note to the effect that “foreign parents seeking enforcement of visitation rights are disadvantaged in Japanese courts,” but failed to submit any other evidence concerning Japanese family law.

Instead, the Court placed great reliance – and took great comfort – in the fact that the mother had previously taken the child to Japan for visitation on several occasions, had always returned the child as promised, had genuinely acknowledged to the satisfaction of the trial court that the father loved the child and that she was anxious to maintain the father’s relationship with the child, and had a history of having scrupulously obeyed all court orders in the past.

Thus, the case must be seen as being limited strictly to its specific facts. The Court relied on the evidence of the mother’s good faith rather than upon any determination concerning the Japanese family law system. It is a fact that Japan does not return abducted children and does not enforce foreign rights of visitation. See Jeremy D. Morley, Japanese Family Law - or The Lack Thereof!, http://www.international-divorce.com/d-japan.htm.
In almost every situation, if a Japanese parent chooses to retain a child in Japan against the wishes of a foreign parent and in violation of an American or Japanese court order, he or she will get away with it. Id. If Mrs. MacKinnon were to choose to ignore those provisions in the New Jersey trial court’s order that require her to allow the father to have extensive visitation with their child, the father will be powerless to compel her to do so as long as she stays in Japan. However, such facts were not before the Court.

While the Court in MacKinnon suggested that future international relocation applications should be conditioned on securing mirror orders in the foreign country, or enforceable contracts, this would not work in the case of Japan, which has no concept of a mirror order and which in any event would never enforce its own order or a contract between parents in such a case. Id.

What this case stands for is the proposition, amply emphasized by the New Jersey Supreme Court, that each case must be viewed individually, on its own particular facts, so as to “permit our courts to flexibly and properly address the myriad, nuanced issues created by family ties that cross international boundaries.” Thus, the Court stressed that in the international removal context, “we afford our trial courts the means to adapt to the variety of unique circumstances presented in family law proceedings.” Every case must be determined on its own facts.

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The Steering Group wishes to thank Darrell Prescott and Aaron Schildhaus for their valued and much-appreciated contributions to the work of this Committee.