Committee Newsletter, October, 2008

Editor: Jeremy D. Morley

Hot Topics

▷ Committee News
▷ Australian Shared Parental Responsibility Law
▷ International Complaint Filed on Behalf of Abused Mothers, Children
▷ Swiss Law Violates Hague Convention
▷ State Department Hague Convention Compliance Reports

Committee News

By Melissa Kucinski

Steering Group

The Steering Group will hold its next conference call on October 21, 2008 at 12 noon eastern time. If you would like to participate in the call, please email Melissa (mkucinski@dberlin.org) to receive dial-in instructions. Also remember that the East Coast of the U.S. will turn its clocks back by one hour the last weekend of October, 2008. Please plan accordingly for our November conference call. All are welcome on Steering Group conference calls.

Programming Task Force

Our committee has formed a CLE task group. Vice Chair Maggie Smith chairs the task group, and Vice Chair Brad Lechman-Su has been actively pursuing many ideas for programs our committee can produce.

In addition to consistently proposing and producing excellent CLE programs for our section’s fall and spring meetings, the task group is also working on a stand-alone program, to be held in Japan, that is currently proposed to include meetings about Japan’s role in international parental child abductions and the Hague Convention, as well as custody laws in Japan. If you are interested in this project, please contact Maggie Smith (margsmith@earthlink.net).

ABA 2007 – 2008 Awards

Our committee has had a successful 2007 – 2008 ABA year.

We were honored to receive runner-up for the Best Committee in the Section of International Law.

We also received the award for Best Use of Listserv.

Please continue to post messages to the Listserv — we appreciate any articles, court cases, notices of upcoming events, questions and updates.

ABA passes Committee’s Inter-Country Adoption policy

Our committee was instrumental in the ABA adopting two separate policies at the annual meeting in New York City in August, 2008. After much debate in our committee and some revisions, the ABA passed a policy with regard to Inter-country Adoption.
In addition, one of our vice chairs, Mary Helen Carlson, and the chair of the Family Law Section’s International Law Committee, Larry Katz, drafted a superb piece of policy supporting The Hague Maintenance Convention that was co-sponsored by our Section and passed without debate at the Annual meeting.

Thank you to Larry and Mary Helen for their efforts and to our entire committee who shared their thoughtful feedback. For more information on policies brought before the ABA House of Delegates in August, please refer to the ABA’s website at: http://www.abanet.org/leadership/2008/annual/.

If you would like to be involved in committee projects, please e-mail Melissa (mkucinski@dberlin.org) and she can help find a project that fits your interests and talents.

Forum: “International Parental Abduction: How can we protect our children?”

Committee member Colin Jones reports that the International Rights of Children Society of Vancouver, Canada, is hosting a forum on November 3 entitled “International Parental Abduction: How can we protect our children?” Topics to be discussed include: the harm done to children, relevant UN conventions, obstacles posed by international travel, and preventative steps.

The panel will be composed of a group of experts including: Colin Jones, Associate Professor at Doshisha Law School in Kyoto, Japan; Anna Bordeau, Assistant National Coordinator, “Our Missing Children” Program, Canadian Foreign Affairs; and Melissa Hawach, Official Spokesperson for The Missing Children Society of Canada. The keynote address will be delivered by Suzanne Williams, Deputy & Legal Director of the International Institute for Child Rights & Development at the University of Victoria.

The forum will be held from 6:30-9:30 p.m. at Vancouver’s YWCA Program Centre (555 Hornby Street). To register, email forum@irocs.org or call 866-373-1783.

Australian Shared Parental Responsibility Law

By Jacqueline Campbell and Maria Kourtis

Jeremy Morley reported in the May 2008 newsletter about problems with the presumption of equal shared parental responsibility which commenced in Australia in 2006.

Under the 2006 amendments, if the presumption is not rebutted, the court must consider whether it is in the child’s best interests and reasonably practicable for the child to spend equal time with each of the parents. The amendments were introduced largely as a result of strong pressure by men’s groups. This pressure also resulted in significant changes in the child support formula (and therefore reductions).

The research which should have directed the previous Government in deciding whether to introduce a shared parental responsibility presumption is now being more closely examined, updated by social scientists and used as evidence in court.

Recently, we ran a trial involving a child about whom interim orders for shared care had been made. The father sought 50/50 care both at the interim hearing and the final hearing. The interim orders provided that the child spent 5 nights each fortnight with the father, broken up so that there were 8 changes each fortnight. The child was only 16 months old at the time the interim orders were made. A second child, conceived just prior to the separation, had since been born and the father sought equal shared care of that child within a very short time frame.

The mother reported that the older child was overly clingy, unsettled and distressed when returned to the mother’s care. The father reported no such behaviors while the child was with him.

In Australian parenting disputes a family report is often prepared by a child psychologist or similarly qualified
professional. The report gives recommendations to resolve the dispute. Part way through the lengthy trial, the family report writer told the parties' legal representatives that the child's behaviour was consistent with stress and an indicator that the parenting regime was not beneficial to the child. The report writer recommended that the child spend more time with the mother, and that the father's time be re-structured so that it occurred less frequently, say only weekly, but for a longer period of time.

The family report writer was influenced by the high level of conflict between the parties, the deterioration in the older child's behavior in the mother's care (but not reported by the father) and the limited communication and trust between the parents. The Court, after hearing the evidence, made interim orders reducing the father's time with the older child by one night a week, and consolidating the father's time into a single block. The younger child's time with the father was increased slightly, and was scheduled to take place regularly throughout the week.

Our experience is that shared care arrangements are often agreed to by parties under the shadow of the new legislation in the mandatory pre-court family dispute resolution process or shortly after proceedings are issued. Once in place it can be very hard to change the arrangements and many parents don't have the financial or emotional strength to continue such risky litigation. Legal aid funding is only available to parties with very limited incomes and few assets. Unless there are allegations of family violence, child abuse, drug use etc, the merit test is a further hurdle.

At the recent National Family Law Conference in April 2008 in Adelaide, an excellent paper was presented by Clinical Child Psychologist and Family Therapist, Dr. Jennifer McIntosh and a former Family Court Judge, the Honorable Richard Chisolm about the impact on children of a shared parenting regime in high conflict families.

Federal Magistrate Tom Altobelli provided commentary on the paper. He referred at length to the research by Janet Johnston and in particular to the article "Children's Adjustment in Sole Custody compared to Joint Custody Families and Principles for Custody Decision Making" (1995) Family and Conciliation Courts Review, 33, pp 415-425. He concluded that "The law is not the problem here, the evidence is."

The preliminary research on the 2006 amendments shows about half of the interim shared care orders are made by consent. Most interim orders are made without the parties, their legal practitioners and the court having the benefit of a family report. Limited evidence from the parties is before the court by way of affidavits only. There is no cross-examination of the parties at the interim stage.

After two years, the impact of the changes are being assessed and there is a move by the courts, lawyers and family counselors to interpret the law in a way which more closely follows the Full Court's pronouncement in the 2006 case of Goode:

“In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with the children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable.”

The precise impact of the recent research on orders made at the interim stage is unknown. However, Courts and legal practitioners are able to invite the Court to consider the research when making interim orders in the absence of professional evidence. Anecdotally, there appears to be more awareness by the Court and legal practitioners of the impact on children of making interim orders for shared care, particularly where there is a high level of conflict between the parents.

Jacqueline Campbell and Maria Kourtis practice in Melbourne, Australia, at Forte Family Lawyers. For more information, please visit their website at www.fortefamilylawyers.com.au.
International Complaint Against the United States Filed on Behalf of Abused Mothers, Children

By Dianne Post

Committee member Dianne Post has authored a petition against the United States with the Inter-American Commission on Human Rights (IACHR). The petition claims that U.S. had failed to protect the human rights of abused family members by frequently awarding child custody to the perpetrators of abuse.

The complaint was originally filed by ten mothers, a man who had been victimized as a child, and several leading national organizations. They presented Post with numerous cases in which the perpetrator of abuse in a given family (typically the father) was given full custody of the child he victimized despite medical evidence of child abuse. Whether these alarming findings might stem from gender bias in the courts or media typecasting is up to discussion.

"Several of the mothers were jailed by the courts because of their persistent efforts to protect their children from abuse," states Post. "Every mother was denied contact with her child for some period of time though none was ever proven to have harmed them."

More specifically, the petition seeks a finding from the IACHR that the U.S. has violated the Declaration of the Rights and Responsibilities of Man as well as the Charter of the Organization of American States. The petition also describes how the U.S. must handle child custody cases in abusive families to comply with its human rights obligations.

Since its inception in 1959, the IACHR has been promoting and protecting human rights in the Americas, examining allegations of human rights violations by members of the Organization of American States (OAS), a body of 35 states which includes the U.S. The IACHR also conducts on-site observations in OAS member states to both check-up on the general human rights situation and follow-up on specific allegations of Inter-American human rights treaties’ violations.

Anyone may present a petition to the IACHR alleging violations of the rights protected in the American Convention and/or the American Declaration. The IACHR ends up processing over 800 cases a year.

When the IACHR receives a petition like that filed by Post, it investigates the details of the case and ultimately prepares a private report for the state in which the petition is filed. The report describes the IACHR’s conclusions concerning the given case, provides the state with recommendations, and sets a deadline by which these recommendations should be implemented. Post’s petition is currently being investigated.

Dianne Post practices in Phoenix, Arizona, at Dianne Post, LTD. For more information, please visit her website at www.diannepost.net.

Swiss Law Undermines The Hague Convention

By Jeremy D. Morley

Switzerland has enacted a new law that is purportedly designed to allow the Swiss courts to apply the Hague Abduction Convention in a gentler and fairer way.

Having reviewed the new act it is my humble opinion that the new law allows -- and indeed encourages -- the Swiss courts to evade and violate the Hague Convention.

Public opinion in Switzerland turned against the Hague Convention when cases were publicized there, and debated in Parliament, concerning abductions into Switzerland by Swiss mothers who were the primary care providers of the children. Apparently all but one of the recent cases decided by the Swiss Federal Tribunal had involved abductions by the child’s mother, which was even higher than the world average of 70%.
Legislators in the Swiss Parliament and the Swiss media had stirred up outrage when the courts ordered the return of abducted children from the haven of Switzerland to the countries of their habitual residence so that the courts in such countries could determine what was best for the children.

The new law is shocking. The most critical provision is Article 5, which clearly violates the principle that is fundamental to the entire structure of the Hague Convention that the court in a Hague case must not consider the child’s best interests, since custody matters should be decided by the courts of the habitual residence. Specifically Article 5 states that:

"Under Article 13 paragraph 1 letter b of the 1980 Hague Convention, the return of a child places him or her in an intolerable situation where:

• placement with the parent who filed the application is manifestly not in the child’s best interests;

• the abducting parent is not, given all of the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction or if this cannot reasonably be required from this parent; and,

• placement in foster care is manifestly not in the child’s best interests."

I am writing a lengthier analysis of the Swiss law which will be published shortly.

Jeremy Morley can be reached at jmorley@international-divorce.com and through his website, www.international-divorce.com

State Department Hague Convention Compliance Reports

By Jeremy D. Morley

Each year, the Department of State Office of Children’s Issues is required under Public Law 105-277, Section 2803 to submit to Congress a report on compliance by treaty partner countries with the 1980 Hague Convention on the Civil Aspects of International Parental Child Abduction (Hague Abduction Convention).

The report includes a list of countries “not compliant” or “demonstrating patterns of noncompliance” with the Hague Abduction Convention. It details longstanding unresolved Hague cases, and it explains the Department of States’ efforts to expand and strengthen the Convention.

In earlier years the report listed countries as “not fully compliant” and “countries of concern” and also identified countries with enforcement problems and countries with long unresolved cases.

I have prepared an analysis of the reports since their inception. The list may well be relevant in cases in which a parent is asking a court to take measures to prevent an anticipated or possible abduction.

In total, some 35 countries have been listed at least once. Some countries have been listed frequently. For example, Austria was listed as “noncompliant” in every single report through 2006, but in the last two years has been identified only as having had some “notable cases.”

The analysis is summarized on the next page:
### Analysis of State Department’s Hague Compliance Reports

<table>
<thead>
<tr>
<th>Year of Report</th>
<th>“Noncompliant”</th>
<th>“Patterns of Noncompliance”</th>
<th>“Notable Cases”</th>
<th>“Not Fully Compliant”</th>
<th>“Countries of Concern”</th>
<th>Countries with Enforcement Problems</th>
<th>Countries with Long Unresolved Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>Honduras</td>
<td>Brazil, Bulgaria, Chile, Ecuador, Germany, Greece, Mexico, Poland, Venezuela.</td>
<td>Austria, Germany, Czech Rep., Colombia.</td>
<td></td>
<td></td>
<td>Brazil, Colombia, the Czech Republic, Germany, Honduras, Israel, Mexico, Netherlands, Poland, Saint Kitts and Nevis, Slovakia, Venezuela.</td>
<td></td>
</tr>
<tr>
<td>2007</td>
<td>Honduras</td>
<td>Brazil, Chile, Colombia, Germany, Greece, Mexico, Poland.</td>
<td>Austria, Germany, Israel, Mauritius, Mexico, New Zealand, Poland.</td>
<td></td>
<td></td>
<td>Australia, Brazil, Colombia, Germany, Honduras, Israel, Mauritius, Mexico, New Zealand, Poland, Romania, Turkey, Venezuela.</td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td>Austria, Ecuador, Honduras, Mauritius, Venezuela.</td>
<td>Brazil, Chile, Colombia, Greece, Mexico, Panama, Turkey.</td>
<td>Hungary, Poland, Romania, Spain, The Bahamas.</td>
<td></td>
<td></td>
<td>Germany, Poland, Sweden, Switzerland.</td>
<td>Australia, Austria, Colombia, Ecuador, Greece, Honduras, Israel, Mauritius, Mexico, Poland, Spain.</td>
</tr>
<tr>
<td>2005</td>
<td>Austria, Colombia, Ecuador, Honduras, Mauritius, Panama, Turkey.</td>
<td>Chile, Greece, Mexico.</td>
<td>Hungary, Poland, Romania, Switzerland, The Bahamas.</td>
<td></td>
<td></td>
<td>France, Germany, Greece, Israel, Poland, Spain, Sweden, Switzerland.</td>
<td>Colombia, Croatia, Greece, Honduras, Israel, Mauritius, Mexico, Poland, Romania, Spain.</td>
</tr>
<tr>
<td>2004</td>
<td>Austria, Colombia, Ecuador, Honduras, Mauritius, Mexico, Turkey.</td>
<td>Romania, Switzerland</td>
<td>Greece, Hungary, Israel, Panama, Poland, The Bahamas</td>
<td></td>
<td></td>
<td>Germany, Poland, Spain, Sweden, Switzerland.</td>
<td>Colombia, Ecuador, France, Germany, Honduras, Ireland, Israel, Mauritius, Mexico, Poland, South Africa, Spain, Turkey, Zimbabwe.</td>
</tr>
<tr>
<td>2002-2003</td>
<td>Austria, Honduras, Mauritius, Mexico, Panama.</td>
<td>Switzerland</td>
<td>The Bahamas, Columbia, Germany, Poland, Spain.</td>
<td></td>
<td></td>
<td>Germany, Israel, Spain, Switzerland.</td>
<td>Australia, Belgium, Colombia, Ecuador, Germany, Honduras, Ireland, Israel, Mauritius, Mexico, Panama, Poland, South Africa, Spain, Zimbabwe.</td>
</tr>
<tr>
<td>2001</td>
<td>Austria, Honduras, Mauritius, Panama.</td>
<td>Mexico</td>
<td>The Bahamas, Columbia, Germany, Poland, Spain, Sweden, Switzerland.</td>
<td></td>
<td></td>
<td>Germany, Israel, Spain, Switzerland.</td>
<td>Australia, Bahamas, Israel, Mexico, Poland, S. Africa, Spain, Switzerland.</td>
</tr>
<tr>
<td>2000</td>
<td>Austria, Honduras, Mauritius, Panama.</td>
<td>Germany, Mexico, Sweden.</td>
<td>Colombia, Poland, Switzerland.</td>
<td></td>
<td></td>
<td>Canada, Germany, Israel, Spain, Switzerland.</td>
<td>Australia, Bahamas, Canada, Colombia, Mexico, Panama, Poland, Spain, Switzerland.</td>
</tr>
<tr>
<td>1999</td>
<td>Austria, Honduras, Mauritius, Mexico, Sweden.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Countries listed:** Argentina, Australia, Austria, Bahamas, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Croatia, Czech Republic, Ecuador, Germany, Greece, Honduras, Hungary, Ireland, Israel, Mauritius, Mexico, Netherlands, New Zealand, Panama, Poland, Romania, Saint Kitts and Nevis, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, Venezuela, Zimbabwe.
International Family Law Committee
Officers:
Melissa Kucinski, Co-chair
Jeremy Morley, Co-chair
Mary Helen Carlson, Vice-Chair
Bradley C Lechman-Su, Vice-Chair
Jessica Sandberg, Vice-Chair
Philip Schwartz, Vice-Chair
Marguerite Smith, Vice-Chair

UPCOMING MAJOR MEETINGS:

FEBRUARY 13-15, 2009
• ABA MIDYEAR MEETING
• BOSTON, MA

APRIL 14-18, 2009
• ABA INTERNATIONAL SPRING MEETING
• WASHINGTON, D.C.