

# International Family Law

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## I. Child Support – Civil and Criminal

### A. INTERNATIONAL CHILD SUPPORT COLLECTION

The United States is not, and is not likely to become, a party to any of the several conventions that deal with the establishment and enforcement of child support maintenance obligations. The United Nations Convention on the Recovery Abroad of Maintenance<sup>1</sup> is currently in force for fifty-seven countries, but the extent to which these countries implement it varies. One of the main reasons that the United States is not a party to this Convention is that it does not require the provision of legal services at no cost to the petitioner, which is required under federal law for U.S. residents. Nor is the United States a party to either of the two child support conventions developed by the Hague Conference on Private International Law (the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children<sup>2</sup> and the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations<sup>3</sup>).

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1. Convention on the Recovery Abroad of Maintenance, June 20, 1956, 268 U.N.T.S. 3, *available at* [http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boo/xx\\_boo/xx\\_1.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/xx_boo/xx_1.html) (last visited June, 25, 2002).

2. Hague Conference on Private International Law, Apr. 15, 1958, 5 AM. J. COMP. L. 650 (1956) (English translation); *available at* <http://www.hcch.net> (last visited June 26, 2002) (available in French and English translations), and U.N.T.S., 1964, No. 7412, p. 163, and 1965, No. 7822, p. 29.

3. Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, Oct. 2, 1973, *available at* <http://www.hcch.net> (last visited June 25, 2002). An English-language title for the 1958 Child-Support Convention (footnote 2, above) is made official in the Preamble and Article 29 of the Convention of Oct. 2, 1973.

Both of these conventions establish bases of jurisdiction for recognition and enforcement of decisions (notably the maintenance creditor's "habitual residence" at the time when the proceedings were instituted) that might raise serious constitutional problems for the United States.<sup>4</sup>

The Hague Conference will begin negotiations of a new convention on the enforcement of maintenance obligations in early 2003. Both the Hague Conference's Permanent Bureau and other foreign child support officials will work with the United States' child support community in determining a new convention that the United States would be able to join.

Until the United States participates in a multilateral child support convention international child support cases in this country will continue to be handled under bilateral federal or state-level arrangements. Since 1996, section 459A of the Social Security Act<sup>5</sup> has authorized the Secretary of State with the concurrence of the Secretary of Health and Human Services to declare reciprocity among foreign countries or political subdivisions for the purpose of enforcing child support obligations. Such declarations can be made only if the country has procedures in effect, or has undertaken to establish procedures, for the establishment and enforcement of duties of support for residents of the United States. These procedures must be in substantial conformity with the following elements set forth in the statute: (1) they must provide for the establishment and enforcement of child support obligations, including the establishment of paternity; (2) they must provide for the collection and distribution of child support payments; (3) they must provide administrative and legal services at no cost; and (4) they must designate a central authority to facilitate handling international cases. Once a country is designated as "reciprocating," it is treated as if it were a part of the United States for purposes of enforcement of child support obligations under the Uniform Interstate Family Support Act (UIFSA). Currently, ten countries and Canadian provinces have been designated as reciprocating. At the time this article is being written a number of additional designations of European countries and Canadian provinces are pending,<sup>6</sup> and the State Department and the Office of Child Support Enforcement of the Department of Health and Human Services will focus on concluding agreements in Latin America and the Caribbean during the upcoming year.

In the absence of federal involvement before 1996, some states entered into informal arrangement with foreign countries based on interstate family support acts. (UIFSA is the act currently in effect in all states.) Since 1968, these acts, originally intended to deal with interstate enforcement, have defined a state of the United States to include foreign jurisdictions that have child support procedures that are substantially similar to those mandated by UIFSA or its predecessors. Lacking the specific requirements mandated by federal law for a federal declaration of reciprocity, the states had greater flexibility in determining foreign reciprocity.

The National Child Support Enforcement Association (NCSEA) changed its bylaws on August 16, 2001, to become an international organization. The new bylaws provide for an International Commissioner (who may not be a citizen or resident of the United States, its

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4. See *Kulko v. Superior Court*, 436 U.S. 84 (1978). See also Brigitte M. Bodenheimer & Janet Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C. DAVIS L. REV. 229, 229-32 (1979).

5. Social Security Act, 42 U.S.C. 659A §459A (2002).

6. As of July 15, 2002, the United States had federal reciprocity arrangements with fifteen foreign countries and Canadian provinces.

territories, or possessions), with full voting rights, selected annually on a revolving basis from Europe/Africa, Asia/Pacific, or the Americas at large. The first International Commissioner is Ase Kristensen, of Norway. The NCSEA Vice President for International Reciprocity also nominates—and the President appoints—members of the International Reciprocity Committee, who come from a number of countries.

#### B. PROSECUTION FOR HARBORING DEADBEAT PARENTS ABROAD

In *United States v. Hill*,<sup>7</sup> the U.S. Court of Appeals for the Ninth Circuit upheld the conviction of a man's current wife for harboring him abroad, in Mexico, where he had fled to avoid prosecution under the Deadbeat Parents Punishment Act<sup>8</sup> for failure to pay child support to his former wife. The current Mrs. Hill was convicted of violating the harboring statute.<sup>9</sup> The Court found there was extraterritorial jurisdiction under the Deadbeat Parents Punishment Act,<sup>10</sup> and therefore there was extraterritorial jurisdiction to prosecute the current wife under the harboring statute given her specific efforts to support him in his fugitive status abroad.

## II. Intercountry Adoption of Children: Summary of Activities in the World of Adoption 2001

#### A. ADOPTION TAX CREDIT

The extension of, and increase in, the adoption tax credit was signed into law on June 7, 2001 at a White House signing ceremony. The Adoption Tax Credit ("Credit") is now upwards of \$10,000 per adoption where the adopting parent(s) has an adjusted gross income under \$150,000 a year, and pays taxes to the government equal to or exceeding the amount of the credit. The Credit applies in cases of both domestic and international adoption.

#### B. IMPLEMENTATION OF THE INTERCOUNTRY ADOPTION ACT AND 1993 HAGUE ADOPTION CONVENTION

The Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) was adopted "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law."<sup>11</sup> The U.S. Senate on September 20, 2000, gave its advice and consent for the United States to become a party to the Hague Adoption Convention once the United States is prepared to implement it.<sup>12</sup> At the same time Congress enacted the Intercountry Adoption Act of

7. *U.S. v. Hill*, 279 F.3d 731 (9th Cir. 2002). A revised opinion (reaching the same result) in this case was filed by the same panel under the same docket number on January 29, 2002. The revisions appear to relate only to the constitutional issues raised by the current wife, based on *Griswold v. Connecticut*, 381 U.S. 479 (1965). The treatment on "Extraterritorial Application of the Harboring Statute" appears to be identical. These decisions may be accessed on the Court's Web site at [www.ce9.uscourts.gov/](http://www.ce9.uscourts.gov/).

8. Deadbeat Parents Punishment Act, 18 U.S.C. 228 (2002).

9. Harboring Statute, 18 U.S.C. 1071 (2002).

10. *United States v. Felix-Gutierrez*, 940 F.2d 1200 (9th Cir. 1991).

11. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, available at <http://www.hcch.net> (last visited June 25, 2002).

12. 146 Cong. Rec. S8866 (daily ed. Sept. 20, 2000); S. Doc. No. 105-51, 105th Cong., 2d Sess.

2000 (IAA) to implement the treaty.<sup>13</sup> The Convention will impose international obligations on the United States; the IAA will help us to implement the Convention to be able to meet our international obligations and otherwise to do things right in our legal/political/social system. Certain IAA sections, requiring the State Department to undertake steps to implement the Hague Adoption Convention and the IAA, have already entered into force. However, several key implementation steps, including the accreditation of agencies and approval of persons who provide adoption services, must be completed before the instrument of ratification may be deposited with the Netherlands Ministry for Foreign Affairs, the depositary for the treaty.

The implementing legislation places with the U.S. Department of State responsibility to monitor intercountry adoption cases, coordinate with foreign authorities, maintain a case registry, accredit or approve adoption service providers, and generally oversee and manage inter-country adoption procedures in this country. The State Department has established a working relationship with Acton Burnell, a consulting firm, to assist with the development of the regulatory framework for implementing the Convention and IAA.

The number of Contracting States under the Hague Convention on Intercountry Adoption rose to forty-four ratifications and accessions following the signature and ratification by Slovenia on January 24, 2002. The Convention will enter into force for Slovenia on May 1, 2002.<sup>14</sup>

Interested parties may go to the Hague regulations Web site at <http://www.haguereg.org> to follow the process of implementing the IAA. At the time this article was being written, there were two important documents on the Web site: (1) the Final Draft Regulations for the IAA, published October 23, 2001, and (2) the Final Draft of Convention Accreditation and Approval Procedures for the IAA, published December 6, 2001. Soon, the State Department will officially publish the final draft of the regulations in the Federal Register for public comment.

Parties interested in seeing the text of the Hague Convention on Intercountry Adoption can download it from the following Web site: <http://www.hcch.net/e/conventions/text33e.html>. The text of the Intercountry Adoption Act of 2000 can be downloaded from <http://www.haguereg.org/images/hr2909.pdf>.

### III. International Child Abduction

The Convention on the Civil Aspects of International Child Abduction<sup>15</sup> (the Hague Child Abduction Convention) was the first multilateral treaty dealing with an international family law problem to be ratified by the United States. It entered into force for the United States on July 1, 1988—at a time when about a dozen countries were parties to it. The ABA had urged approval and ratification of it at its Midwinter Meeting in February of 1981.<sup>16</sup>

13. Intercountry Adoption Act of 2000, 42 U.S.C. § 14901 (2000) *et seq.* The American Bar Association had, in February of 1994, urged the Senate to give its advice and consent to ratification and urged the Congress to enact implementing legislation to permit the United States to participate in this multilateral Convention; see ABA Policy and Procedures Handbook 2000–2001, at 274 [hereinafter ABA Handbook].

14. See Intercountry Adoption Act of 2000, 28 Fam. L. Rep. (BNA) 1167 (Feb. 12, 2002), available at <http://pub.bna.com/fl/hr2909.pdf> (last visited June 25, 2002).

15. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, available at <http://www.hcch.net> (last visited June 26, 2002).

16. See ABA Handbook, *supra* note 13, at 269.

The number of States Parties (countries that have ratified or acceded to this law-making treaty for all or a part of their territory) reached seventy with Latvia's accession in the fall of 2001. The treaty enters into force automatically between the United States and countries that *ratify* under Article 37, but the United States lacks treaty relations with a dozen countries that have *acceded* under Article 38 because their accessions have not yet been formally accepted by the United States. Thus, the United States had relations under this treaty with fifty-eight countries as of the end of 2001. These countries include: (1) the other NAFTA countries, (2) all fifteen members of the European Union, (3) Israel, (4) Argentina, (5) Venezuela, (6) Australia, (7) New Zealand, (8) the Hong Kong and Macau Special Administrative Regions (SAR), and (9) Turkey.<sup>17</sup>

A significant decision concerning the primary concept of the "habitual residence" of a child that has been removed from one country or retained after a visit in another was *Mozes v. Mozes*,<sup>18</sup> a California case decided by the U.S. Court of Appeals for the Ninth Circuit on January 9, 2001. The three children whose return to Israel under the Hague Convention was sought by their father had resided for just less than a year in Beverly Hills, when their mother filed suit for divorce and custody in the Superior Court of Los Angeles County. All members of both parents' families had only Israeli nationality, all had lived their whole lives in Israel prior to the temporary sojourn of the mother and children to California, and none had immigrant status. The father's Hague Convention suit was brought in federal district court in Los Angeles, and the judge ruled that the children's habitual residence had been in California when the custody suit was initiated. Thus, the father's petition for the children's return to Israel was denied by the district court on the ground that an essential element of the Hague Convention action was lacking because the habitual residence of the children was not in Israel at the time of their retention in California. On appeal, the Ninth Circuit reversed and remanded for further consideration of the children's habitual residence. Significantly, the Ninth Circuit also observed that a custody decree issued by the Superior Court of Los Angeles County during the period between the federal district court's ruling and the decision on appeal was "premature," in view of Article 16 of the Hague Convention.<sup>19</sup>

The Supreme Court of the United States ended another international family saga on October 9, 2001, by denying the application for a writ of certiorari to the United States Court of Appeals for the Second Circuit in *Croll v. Croll*.<sup>20</sup> The U.S. District Court for the Southern District of New York had ordered the return of the child to Hong Kong under the Hague Child Abduction Convention, but the majority of the appellate panel (over a strong dissent by Judge Sotomayor) reversed, ruling that the right under a Hong Kong court order to consent or to refuse consent to removal of the child from the HKSAR did not fall within "rights of custody" as defined in the Hague Child Abduction Convention. The reasoning of the Second Circuit's majority in *Croll v. Croll* had, in the meantime, been found to be "contrary to the weight of authority" by the Constitutional Court of South

17. Full Status Report on Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, available at <http://www.hcch.net> (last visited June 26, 2002).

18. *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), *reh. den.*, Feb. 20, 2001.

19. Two federal appellate cases that were decided in 2001 stated the principle that a parent cannot create a new habitual residence for a child by wrongfully removing and sequestering the child: *Diorinou v. Mezitis*, 237 F.3d 133, 141-142 (2d Cir. 2001); *Miller v. Miller*, 240 F.3d 392, 400 (4th Cir. 2001).

20. *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. den.*, Oct. 9, 2001.

Africa in the case of *Sonderup v. Tondelli*,<sup>21</sup> although this Court distinguished *Croll v. Croll* on its facts.

The fourth meeting of the Special Commission, which meets periodically to review the operation of the Hague Child Abduction Convention was held at the Peace Palace in The Hague March 22–28, 2001. Mary Ryan, Assistant Secretary of State for Consular Affairs, headed the United States Delegation. In addition to representatives of the Central Authorities designated by State Parties under Article 6 of the treaty (as well as law professors, and observers from IGOs and INGOs), a substantial number of distinguished judges took part in this meeting. Peter Pfund of the United States Department of State chaired the first part of the meeting; Justice Catherine McGuinness of the Supreme Court of Ireland chaired the second part. The text of Conclusions and Recommendations<sup>22</sup> of this meeting has been issued by the Permanent Bureau (the secretariat) of the Hague Conference on Private International Law—the independent intergovernmental organization that negotiated and drafted this Convention’s final text in October of 1980.

#### IV. Measures for the Protection of Children

The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children<sup>23</sup> entered into force for the first three countries<sup>24</sup> on January 1, 2002, following ratification by Slovakia on September 21, 2001. Australia has announced that it will ratify soon,<sup>25</sup> and a number of the Member States of the European Union have expressed support for ratification.

The 1996 Hague Convention<sup>26</sup> is analogous at the international level to the Uniform Child Custody Jurisdiction and Enforcement Act adopted by the National Conference of Commissioners on Uniform State Law in 1997 and recommended for approval by all states by the American Bar Association in 1998.<sup>27</sup>

21. Case CCT 53/00 decided on Dec. 4, 2000, at para. 20–25, esp. para. 22. Judgment by Goldstone J for a unanimous court, *available at* <http://www.concourt.gov.za/courtrecords/2000/sonderupcr.shtml> (last visited June 25, 2002).

22. Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Mar. 22–28, 2001), *available at* <http://www.hccp.net> (last visited June 26, 2002).

23. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, *available at* <http://www.hcch.net> (last visited June 26, 2002).

24. *Id.* The countries include the Czech Republic, Monaco and Slovakia (the Convention has been signed, but not yet ratified by Morocco, the Netherlands and Poland).

25. See Resolutions of the 2001 World Congress on Family Law and the Rights of Children and Youth held in Bath, England, on Sept. 19–22, 2001, *available at* <http://www.lawrights.asn.au/>, Resolution no. 13, entitled: “The Hague Convention on the Protection of Children 1996.”

26. See ABA Handbook, *supra* note 13. Ratification and the enactment of appropriate implementing legislation were urged by the American Bar Association in August 1997.

27. See *Sampson & Tindall’s Texas Family Code Annotated* (Aug. 2001 ed.), at 461–462; see also ABA Handbook, *supra* note 13.

## V. Protection of Incapacitated Adults

The Convention on the International Protection of Adults<sup>28</sup> has been signed by France and the Netherlands but not yet ratified, so it is not yet in force.<sup>29</sup> In addition to its provisions on jurisdiction over guardianship proceedings and other measures of protection for adults, it contains articles to facilitate the international recognition of durable powers of attorney. Ratification and appropriate implementing legislation are presently under study by the United States Department of State.

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28. Convention on the International Protection of Adults, Jan. 13, 2000, *available at* <http://www.hccp.net> (last visited June 26, 2002).

29. Ratification and the enactment of appropriate implementing legislation were urged by the American Bar Association in 2000; *see* ABA Handbook, *supra* note 13.

