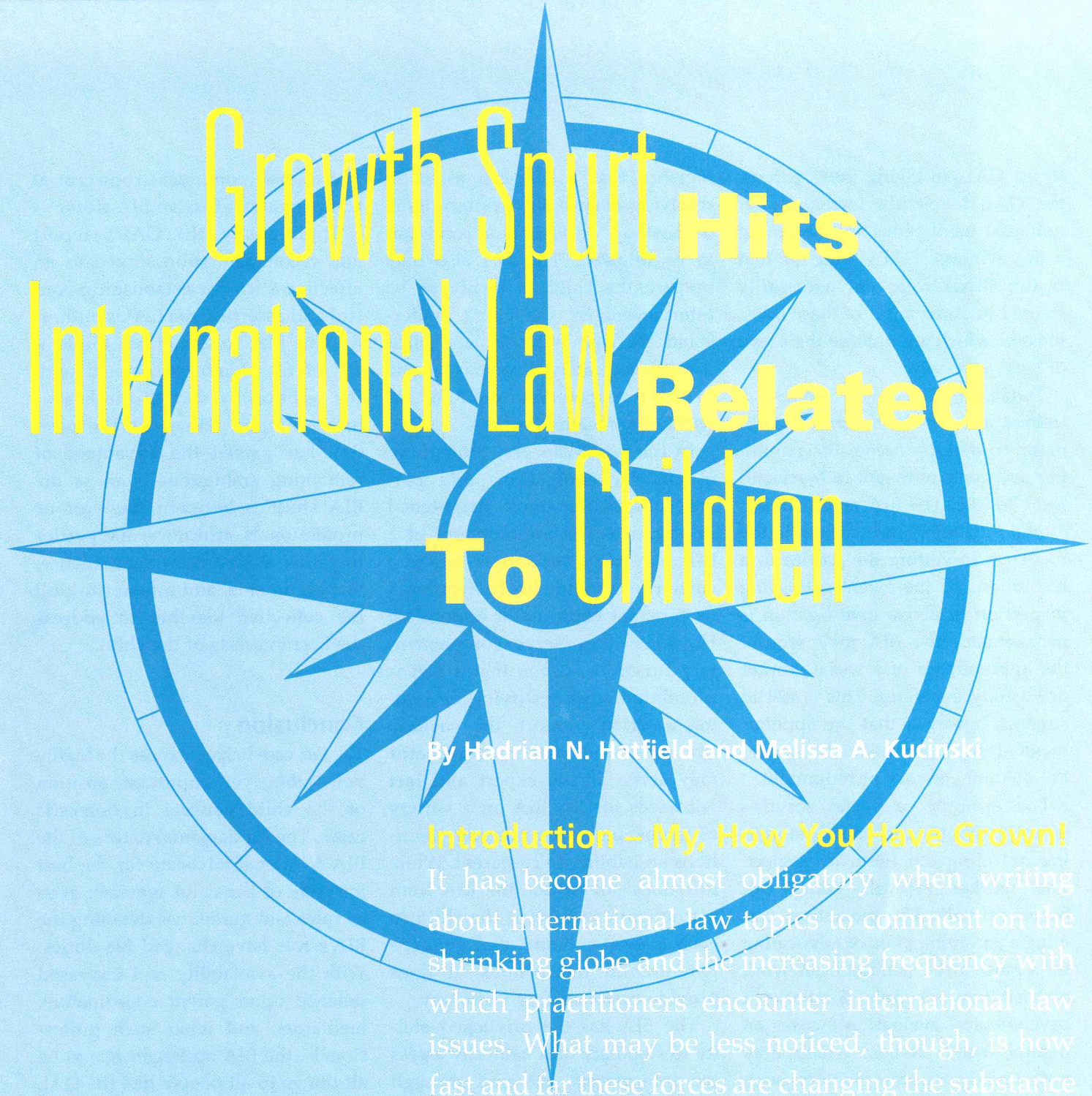

Growth Spurt Hits International Law Related To Children

By Hadrian N. Hatfield and Melissa A. Kucinski

Introduction – My, How You Have Grown!

It has become almost obligatory when writing about international law topics to comment on the shrinking globe and the increasing frequency with which practitioners encounter international law issues. What may be less noticed, though, is how fast and far these forces are changing the substance of international law. Perhaps nowhere is this more evident than in the recent growth of legal initiatives related to children.

The internationalization of laws affecting children includes a number of Hague Conventions aimed at much more than just parental child abduction, although the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("1980 Abduction Convention") is the first of many and likely the most well-known. See http://www.hcch.net/index_en.php?act=conventions.text&cid=24. Among the other multilateral efforts to codify international law applicable to children are conventions on the enforcement of custody orders, and on the payment of child support. These relatively new additions to primary sources of law have themselves caused changes, especially in the rapidly maturing realm of international child relocation and abduction.

One such area of consequential change is the development of new primary sources of domestic law within the United States, such as the Uniform Child Abduction Prevention Act (currently in force in the District of Columbia) and federal criminal statutes. In the common law domain, tortious interference with parental rights is an old concept finding new life in reaction to the globalization of families and the limited application of the 1980 Abduction Convention.

Other changes have occurred at the policy level, including new rules for issuance of United States passports, various guidelines for decision making in international relocation cases, and the nascent emphasis on mediation in resolving international child relocation and abduction cases.

Yet another change is increased harmonization between the international conventions and U.S. statutory sources, including the UCCJEA and UIFSA.

This article will examine some of the more important Hague Conventions that address children, and the growth they have caused within our domestic legal system, both recent and imminent.

International Child Abduction

The 1980 Abduction Convention

Anyone unfortunate enough to represent a client whose child has already been abducted out of the United States by the other parent needs to know immediately whether the 1980 Abduction Convention applies. This reality alone testifies to the importance and impact of this Convention. In order for the 1980 Abduction Convention to apply, the other country must have ratified it, and the Convention must be in force between the United States and that country (with both countries accepting the other's accessions to the treaty). A good source for checking this is the U.S. Department of State's Bureau of Consular Affairs website at www.travel.state.gov. In general, the Convention applies mostly to European and North American countries, although a growing number of countries in Asia and South America have ratified it. The 1980 Abduction Convention is implemented into U.S. law through the International Child Abduction Remedies Act (42 USC 11601 et seq.) ("ICARA").

The 1980 Abduction Convention is more a jurisdictional tool than anything else. It provides for the prompt return of a child who is abducted from that child's "habitual residence" to another contracting state, or who is wrongfully retained outside the child's "habitual residence" country. The premise underlying the 1980 Abduction Convention is that the best court to handle the custody case is in the country of the child's "habitual residence."

The 1980 Abduction Convention has some key timeframes to keep in mind. Perhaps most important among these is the need for a parent to bring a petition under the Convention within one year of the abduction or wrongful retainer. Otherwise, a defense that the child is now well settled in the new environment may apply and preclude return of the child. (See Article 12 of the 1980 Abduction Convention). This time constraint sometimes conspires with one of the biggest obstacles to pursuing relief under the 1980 Abduction Convention – a requirement that any petition for return be heard by a court in the jurisdiction where the child is then located. This can be a problem if the abducting parent is hiding the child. In some cases, a parent might successfully argue equitable tolling of a timeframe that precludes a child's return. One helpful timeframe under the Convention is that ideally a case should be heard within six weeks from the date the proceedings are commenced.

Several defenses to returning the child exist under the 1980 Abduction Convention, in addition to the one year filing limitation. A child of sufficient maturity may have a valid objection to being returned (Article 13). The Convention also precludes the return of a child that would present grave risk of physical or psychological harm or put the child in an intolerable situation (Article 13).

Despite its limitations and built-in defenses, the 1980 Abduction Convention has proven essential in reducing the incidence and severity

of international parental child abduction. It has done so through its inherent mechanisms and procedures, through the increased awareness it has brought to parental abduction cases, and through the changes in domestic laws it has engendered to help prevent these abductions in the first place.

Prevention – UCAPA, Passport Alert Program

One domestic legal development responsive to the scourge of parental child abduction, both domestic and international, is the Uniform Child Abduction Prevention Act (UCAPA). *See e.g.* District of Columbia Code, annoted, §16-4606 et. seq. Drafted by the Uniform Law Commission, it applies equally to domestic and international child abductions, and has been enacted in the District of Columbia, and at least a half dozen additional states. UCAPA is particularly useful in helping prevent parental child abductions because it lists a fairly exhaustive set of factors designed to alert a judge to the possibilities of child abduction. Such factors include: abandoning employment, selling a primary residence, closing bank accounts, or seeking passports for themselves or the child. Other risk factors include: a person who has strong familial or cultural ties to another country or state, or who has used multiple names or identities. One often overlooked risk factor is the likelihood a parent could take a child to a country that is not a signatory of the 1980 Abduction Convention, or that is a signatory country but is out of compliance with its treaty obligations. (Section 7 of UCAPA). The U.S. Department of State publishes a compliance report each year in regard to countries' compliance with treaty obligations. UCAPA also spells out very detailed measures that a court can take to prevent potential child abduction (either nationally or internationally). These measures range from the more benign travel restrictions for the child to the more extensive use of law enforcement and warrants.

Another highly used preventive measure available to families in the United States is the U.S. Department of State's Passport Issuance Alert Program. This program allows a parent to complete a basic form, file it with the State Department, and thereby receive notification should anyone else request a U.S. passport on behalf of the child. It is extraordinarily important to recognize, however, that a child still may obtain a foreign passport. Whereas generally both parents must sign a U.S. passport application for a minor child (with some exceptions), many foreign countries have no such requirement. Even if a foreign country requires both signatures for a passport, not all foreign passport agencies adhere strictly to this requirement. And even a U.S. court order that forbids a parent from obtaining a foreign passport may be ineffective. Such an order cannot bind a foreign country to refuse one of its own citizens a passport.

In addition, it is particularly important to recognize that the U.S. has no border exit controls. No requirement exists that a parent must demonstrate permission to take a child out of the United States before leaving. Some other countries have such a requirement, however, and if a parent takes their child to such a country, the other parent may need some type of parental authorization upon leaving that country to return with the child to the United States. As a result, family law practitioners need to be skilled in spotting potential child abduction cases and taking pro-active steps to prevent the child abduction, without being alarmist and creating additional unnecessary friction between the parents, who likely already are embroiled in a custody case.

Criminal Statutes – State and Federal

Another domestic legal development is the criminalization of parental child abduction, whether within the United States or to another country. Many states have criminal or quasi-criminal statutes that address parental child abduction. *See* Maryland Code, Family Law Article, §9-304 *et seq.* In addition, federal law makes it a felony to wrongfully remove or retain a child under 16 outside the United States with the intent to obstruct the lawful exercise of parental rights. International Parental Kidnapping Crime Act, 18 U.S.C. 1204 ("IPKCA"). Violations of IPKCA are penalized by fine and/or imprisonment up to 3 years. When combined with the immigration consequences of criminal conviction, these can be powerful deterrents to international parental child abduction. One caveat, however, is the potential use of the criminal consequences to justify a defense under the 1980 Abduction Convention based on psychological harm to a child if the parent is imprisoned.

Tort Actions (Khalifa v. Shannon)

A recent and creative domestic legal development available to help prevent parental child kidnapping stems from the Maryland case of *Khalifa v. Shannon*, 404 Md. 107, 945 A.2d 1244 (2008). The Court of Appeals recognized the tort of interference

with parental rights, and affirmed a judgment against the offending parent and her family in the amount of $3,017,500 for compensatory and punitive damages. Thus, a number of tools exist to fill any gaps in the "non-exclusive" remedy of filing a petition under ICARA for application of the 1980 Abduction Convention to a case of international parental child kidnapping.

Mediation – Initiatives

In addition to the compulsion tools discussed above, mediation has become a more widely acceptable means of resolving all family disputes, including international parental child abductions. The 1980 Abduction Convention specifically mandates that states that are parties to the Convention attempt to secure the voluntary return of the child. (Article 10). The Hague Conference is in the process of finalizing a Guide to Good Practice on how best to mediate these complex cases. Perhaps the most important point to acknowledge is that the mediator must be highly skilled and trained, and be familiar with a variety of international child custody and abduction laws. The American Bar Association's Section of International Law has formed a task force to make recommendations in this regard, including minimum mediator credentials, a training curriculum for mediators, and how to handle allegations of domestic violence in these cases. Both authors of this article sit on the board of directors of a non-profit designing a pilot mediation program to handle cross-border child custody, relocation and abduction cases (see www.globalinitiative.org).

International Child Relocation

The Washington Declaration

International child relocation is the topic of increasing discussion, analysis, and study. The Hague Conference on Private International Law, along with the International Centre for Missing and Exploited Children ("ICMEC") held a judicial conference in March, 2010, that resulted in a set of agreed-upon points or guidelines for analyzing international family relocation cases. These agreed upon points are known as the Washington Declaration on International Family Relocation

("Washington Declaration). (http://www.icmec.org/missingkidsservlet/NewsEventServlet?LanguageCountry=en_X1&PageId=4240, accessed on 6/19/11). The Washington Declaration provides that the parent desiring relocation should provide reasonable notice of the intent to relocate prior to relocating or starting relocation proceedings.

In an attempt to create more uniformity in deciding relocation cases, the Washington Declaration also outlines several factors for consideration prior to allowing or denying an international relocation. As one can imagine, these factors focus on the practical realities inherent in a cross-cultural family living in different countries, and perhaps on different continents. The Washington Declaration, while non-binding, is a set of principles agreed upon by top judges and scholars from Argentina, Australia, Brazil, Canada, France, Egypt, Germany, India, Mexico, New Zealand, Pakistan, Spain, the United Kingdom and the United States of America.

A Model ABA Act

Also in an effort to create some uniformity among U.S. states in regard to child relocation, the American Bar Association has drafted a Model Act related to child relocation. It considered the Washington Declaration among existing U.S. statutes and caselaw. The Model Act provides for the method and timing of notice from one parent to the other prior to relocation, and also provides a set of factors to consider when analyzing a relocation case. This Act was approved by the American Bar Association's Family Law Section in 2011, and the next step is presentation to the ABA House of Delegates.

International Custody Orders

The 1996 Jurisdiction Convention versus the UCCJEA

Another change in U.S. law that is still on the horizon harkens back to 2010 when the United States signed the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children ("1996 Jurisdiction Convention"). (http://www.hcch.net/index_en.php?act=conventions.status&cid=70, accessed 6/17/11). Simply stated, the 1996 Jurisdiction Convention is a conflict of law treaty. It provides a framework for the international recognition and enforcement of custody orders between signatory countries. At present, the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which has been passed in some form by all states (although at least one state still uses the predecessor law, the UCCJA), generally allows courts in the United States to register and enforce a foreign custody order as if it were a U.S. custody order. It is less common, however, for a foreign country to recognize and enforce a U.S. custody order. This poses a significant problem for practitioners who find their clients in a situation abroad where the other parent is in contempt of a U.S. custody order.

The 1996 Jurisdiction Convention includes several specifically delineated exceptions to the rule of recognition and enforcement of a foreign custody order. (Article 23(2) of the 1996 Jurisdiction Convention). No recognition or enforcement is required for a custody order issued by a court without jurisdiction as defined by the Convention. Similarly, enforcement is not required if a parent was never given an opportunity to be heard (except in some emergency situations). And, no obligation exists to recognize a custody order that is against public policy (e.g. one that fails to consider the best interests of the child).

One exception to recognition and enforcement that is likely to prove controversial with U.S. lawyers and judges is when the child had no opportunity to be heard. This exception is in line with the United Nations Convention on the Rights of the Child, which the United States has not ratified. This exception may also cause problems for recognition and enforcement of U.S. custody orders abroad. While the 1996 Jurisdiction Convention seeks to simplify and expand foreign recognition of custody orders, in many cases this exception could be used against U.S. custody orders. U.S. custody orders typically are entered without affording the child's voice the same level of acknowledgement found in the courts of many other countries. This can include routine child testimony, even at very young ages. As a result, the U.S. practitioner handling an international custody case in a local U.S. court may wish to argue for a custody evaluation, Best Interest Attorney/Guardian *Ad Litem*, or in camera interview of the child if for no other reason than to help ensure the ultimate U.S. custody order can be enforceable abroad.

The 1996 Jurisdiction Convention, unlike the UCCJEA, bases jurisdiction to "take measures directed to the protection of the child's person or property" (Article 5) on the

child's "habitual residence." The Convention nowhere defines this key term. Unfortunately, U.S. case law, while attempting to define "habitual residence," provides less than clear guidance. Since the 1980 Abduction Convention also uses "habitual residence," several federal courts have defined this term – but each differently. In *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), the Court focused on the parents' shared intent to relocate a child. In 7th Circuit cases, however, the court focused more on the child's intent to relocate.

The UCCJEA, on the other hand, establishes jurisdiction on the basis of the child's "homestate." This is defined under the Act as "the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months, including any temporary absence, immediately before the commencement of a child-custody proceeding." *See e.g.* Maryland Code, Family Law Article, §9.5-101(h). In the case of a child younger than six months old, the term means the State in which the child lived from birth. *See* Section 102(7) of the UCCJEA.

Another poignant distinction apparent when reviewing the 1996 Jurisdiction Convention is that it fails to include our established concept of "continuing exclusive jurisdiction." This notion inherent to the UCCJEA allows for the court that issued an original custody order to keep jurisdiction so long as either party or the child are domiciled within that court's geographic jurisdiction. See Section 202 of the UCCJEA. The 1996 Jurisdiction Convention, however, bases modification jurisdiction on the child's habitual residence. If the child's habitual residence changes (a fact

based analysis), then so does modification jurisdiction.

The 1996 Jurisdiction Convention still needs implementing legislation in the U.S. before it can become law. As part of that process, the current UCCJEA must be reviewed, and changes to it may be necessary. The Uniform Law Commission has formed a drafting committee that began meeting in the fall 2011 to review the UCCJEA with this perspective in mind.

International Child Support

Maintenance Hague Convention and UIFSA 2008

Within the U.S., there are extensive federal and state efforts to locate parents and their assets, establish paternity, and order child support across state borders. This, however, does not account for international cases, and their attendant complexities of foreign assets, different currency, different standards of living, and creditor based systems. In November, 2007, the U.S. sent a delegation to the Hague Conference to participate in the drafting and adoption of an international treaty designed to improve the lot of parents and children who seek financial support across international borders. On November 23, 2007, the Hague Conference adopted the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance ("Maintenance Convention"). The U.S. was one of the first parties to sign this Convention. At present, the U.S. has actively participated in drafting the Maintenance Convention implementing legislation and has modified the existing Uniform Interstate Family Support Act ("UIFSA") into a revised act, colloquially called UIFSA 2008. The Maintenance Convention received approval of the U.S. Senate on September 29, 2010. UIFSA 2008 would need to be uniformly passed among all U.S. states and territories to fully implement the Maintenance Convention. With its ultimate implementation, the Maintenance Convention aims to facilitate a more seamless ability to obtain and enforce child support orders internationally.

Conclusion

Globalization means more than just a shrinking world – it also means a growing world family, where relocation and multiple nationalities abound. This growth phenomenon naturally means more rules. And the more rules, the more complex the interrelationships among similar rules, and the more conflict naturally occurs between similar rules. This leads to more effort developing and harmonizing rules into a coherent and functioning system – and thus to more change in our known and familiar domestic legal world. This certainly is evident in laws directed at children. We already have seen a burst of new legal solutions addressing international parental child abduction, which is spilling over into the areas of relocation, recognition and enforcement of custody orders, and payment of child support. These newer areas have yet to see much growth in the domestic family law responses, but if experience is a guide, this too will change - soon.

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