

## **Committee Newsletter, May Day, 2008**

Editor: Jeremy D. Morley

### **Hot Topics**

- ⇒ **Committee News**
- ⇒ **Mediation in Hague Abduction Cases**
- ⇒ **Settlement and Child Objection Defenses in Hague Convention Cases in the UK**
- ⇒ **Australian Child Custody Law**
- ⇒ **New German Alimony Law**
- ⇒ **International Parental Child Abduction to India**

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### **Committee News**

By Melissa Kucinski

#### **Membership Task Force**

Our committee has created a Membership Task Force to increase membership in our committee and in the International Law Section at large. The task force's initial project is to increase membership throughout Asia. In doing so, the task force will be working with the Section and Japanese bar associations to host a future program in Japan.

If you have any ideas for the Task Force, please contact its chair, Marguerite Smith at [margsmith@earthlink.net](mailto:margsmith@earthlink.net).

#### **Programming Task Force**

Our committee Programming Task Force had proposed a CLE for the Brussels Belgium meeting in Fall

2008, and just learned that it was accepted. The program will be titled **Asset Protection Strategies: The Role of Prenuptials, Trusts and Other Offshore Vehicles**.

If you have ideas for additional programs for future section meetings, regional meetings, teleconferences or webinars, please contact the Programming Task Force chair, Marguerite Smith at [margsmith@earthlink.net](mailto:margsmith@earthlink.net).

#### **Steering Group**

If you would like to become a member of the committee's Steering Group, please contact Melissa Kucinski ([mkucinski@dberlin.org](mailto:mkucinski@dberlin.org)) or Jeremy Morley ([jmorley@international-divorce.com](mailto:jmorley@international-divorce.com)) for more information. The Steering Group holds monthly conference calls to discuss committee business.

If you are currently a member of the Steering Group, please e-mail Brad Lechman-Su at [Bradleyl-s@jrl-s.com](mailto:Bradleyl-s@jrl-s.com) with your current contact information so that he may keep a current list of all Steering Group members.

#### **World Congress**

The 5th World Congress on Family Law and Children's Rights will be held in Nova Scotia from August 23 – 26, 2009. For additional information, please see:   
<http://www.lawrights.asn.au/>.

#### **Hague Abduction Cases Coming into the United States**

Please remember that the U.S. Department of State, Office of Children's Issues (CI), has assumed all work on incoming Hague abduction cases as of April 1, 2008. As the U.S. Central Authority, CI will be the point of contact for

all cases involving children abducted to the United States from a partner foreign country (incoming cases), as it has been for cases involving children abducted from the United States to a partner foreign country (outgoing cases).



### **Thank You to the National Center for Missing & Exploited Children**

Our committee would like to send a heartfelt message of gratitude to the National Center for Missing & Exploited Children who so diligently managed all incoming Hague abduction cases for twelve years. NCMEC will still manage all incoming abduction cases from a non-Hague signatory. NCMEC's leadership and expertise has been, and will continue to, touch the lives of so many families worldwide.



### **Welcome ABA Family Law Section, International Law Committee**

The ABA Family Law Section's International Law Committee, chaired by Larry Katz, will be receiving this e-newsletter as part of a cooperative effort to engage both committees in their common work. Our committee welcomes you to contact us to learn more about us and our projects.

## **Mediation in Hague Abduction Cases**

By: Marguerite (Maggie) Caroline Smith

### **To what extent, if at all, should mediation be used to resolve disputes under the 1980 Hague Convention on the Civil Aspects of International Parental Child Abduction (Hague Convention)?**

Many practitioners have been suspicious of mediation in Hague cases. They have heard or experienced horror stories where the abducting parent has used the delay,

caused by the mediation, to take the child to another location. Some fear that any delay may be seen as acquiescence in the child's removal (a defense to a Hague petition) or that an excessive holdup could lead to the establishment of a new habitual residence for the child and therefore prevent a return under the Hague Convention.

It would be hard to find a family law attorney who has not witnessed the benefits of mediation in a domestic (as opposed to an international Hague Convention) case. The benefits inure to the child, the parents and the legal system. Mediation results in less stress to the child and the parents, a greater chance of future cooperation between the parents, more likelihood that an agreed order will be obeyed and less stress on an overworked judicial system. One would assume the same benefits would come from mediation in the international arena. However, the international case has the added fear and uncertainty of foreign country involvement.



The United States Central Authority (USCA) has given a cautious green light to the use of mediation in Hague cases. In the US Department of State Report on Compliance with The Hague Convention dated April 2007, it reports, at page 18, as follows: "The USCA believes that mediation may be a good tool to reduce litigation in Convention cases, lowering the level of conflict between the parties and speeding up the resolution of the cases. Several inter-country mediation projects have shown that parents, with proper professional intervention, can come to a satisfactory arrangement for custody and visitation. The Department has seen encouraging results from mediated settlements in France Germany and the United Kingdom."

A pilot project in the United Kingdom was conducted and published by the Reunite Child Abduction Center with funding from the Nuffield Foundation. The results were published in October 2006 under the title Mediation in International Parental Child Abduction. It should be noted that England is arguably an ideal setting for such a project. Hague abduction cases are tried by High Court

Family Division judges. Applicant parents whatever their means are entitled to mandatory legal aid to pursue the application for the return of the child. According to the report, cases are normally resolved within six weeks and the application will result in an immediate return of the abducted child where appropriate. For the reader, depending upon which jurisdiction (country) is to hear a Hague case the environment may be more or less amenable to mediation.



The English Reunite pilot program addressed issues which have, in the past, provided concern to international family law practitioners, by attaching safeguards to the process.

For example, mediation was started only after an application for a return had been issued and had been heard on an initial hearing by the court. The court took measures to ensure that the child was not moved to another country or place of hiding. The participants were assured that a parent's participation would not be construed as acquiescence, nor failure to cooperate used against them. If the mediation process failed, the Hague Convention application proceeded. No reference to what happened in mediation was to be made, except for child protection issues (discussed in the Reunite report) and any report prepared as to the child's objections to a return to the requesting State.

If the parents agreed, the settlement terms would be set down in a Memorandum of Understanding but that Memorandum could not be used against them in abduction proceedings. Only after that Memorandum had been converted into a Consent Order and submitted in the Hague Proceedings would it be before the Court. The lawyer overseas was asked to register/mirror the Consent Order in the overseas jurisdiction.

For the pilot project, it should be noted, that essentially all mediation expenses were covered by the grant which made it a somewhat artificial situation. These included the applicant parent's airfare up to a set limit, hotel accommodation for a maximum of 5 days, and other travel and subsistence costs. The UK defendant parent was also covered for travel, subsistence and hotel accommodation

where required. Mediators' fees, interpreter fees, and administration charges were also provided from the grant.

The results were, on the whole, promising. A Memorandum of Understanding was agreed in 75% of all cases mediated. Reportedly a significant number of these were converted to a Consent Order. 67% of the responding solicitors representing applicant parents reported that a Consent Order had been reached and 86% of those responding solicitors who represented defendant parents reported a Consent Order. 95% of the parents said they would recommend mediation to others.

Feedback from the participants, including the mediators, led to the following Findings (amongst others), some of which obviously differ from, or are not essential considerations in a domestic case: That two mediators are necessary; that they must have expertise in the area of international child abduction and the Hague Convention; that three hour sessions are generally enough; and that in most cases the mediation did not significantly delay the final hearing in the Hague Convention proceedings.

Upon review of the Reunite report, we could conclude that mediation of Hague cases should be encouraged for willing participants.

However, as practitioners we must be vigilant in ensuring that safeguards are in place to promote confidence in the process. These safeguards necessarily require a friendly jurisdiction whose legal structure upholds the integrity of the mediation process in Hague cases. It is up to those of us who are familiar with this area of practice to work towards putting secure mechanisms in place where they are lacking in our respective jurisdictions.

Marguerite (Maggie) Smith practices in Seattle WA, USA. She can be reached at [margsmith@earthlink.net](mailto:margsmith@earthlink.net)