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Barbara Stark

Maurice A. Deane School of Law at Hofstra University

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The Internationalization of American Family Law

by
Barbara Stark*

I. Introduction

Even fifty years ago, when the American Academy of Matrimonial Lawyers was formed, the United States was a superpower and Americans traveled for pleasure and worked abroad. Then, like now, the United States was a magnet for immigrants seeking freedom, or asylum, or opportunity. Then, like now, human relationships crossed geographical and political boundaries, challenging the limits of family law.

But globalization and the vast migrations of capital and labor that have accompanied it in recent decades have transformed family law in once unimaginable ways. Families have been torn apart and new families have been created. Borders have become more porous, allowing adoptees and mail order brides¹ to join new families and women fleeing domestic violence² to escape from old ones. People of different nationalities marry, have children, and divorce, not necessarily in that order. They file suits in their respective home nation states or third states, demanding support, custody, and property. Otherwise law-abiding parents

* Professor of Law and John DeWitt Gregory Research Scholar, Hofstra Law School. Thanks to Hofstra Law School for generous support, to reference librarian Patricia Kasting for research assistance, and to Joyce Cox for her skill and patience in preparing the manuscript.

¹ See, e.g., Nora Demleitner, *In Good Times and Bad: The Obligation to Protect 'Mail Order Brides'*, in 2 *WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* 613 (Kelly D. Askin & Doreen M. Koenig eds., 2000).

² THE UNITED STATES' GENDER GUIDELINES FOR OVERSEAS REFUGEE PROCESSING, drafted in 2000, explicitly recognizes domestic violence as a form of gender-related persecution. BARBARA STARK, *INTERNATIONAL FAMILY LAW: AN INTRODUCTION* 241 (2005).

risk jail in desperate efforts to abduct their own children from foreign ex-spouses.³

International family law (IFL) has been regarded primarily as the province of ‘private international law’, which refers to the rules regarding conflicts of law in disputes between private persons, such as spouses. Private international law draws on conflicts of law principles in general, as well as the conventions drafted by the Hague Conference on Private International Law, in particular. ‘Public international law’, in contrast, refers to the rules and norms governing disputes among nation states. But public international law plays an increasingly important role in IFL. It includes human rights law, for example, such as women’s rights and lesbian/gay/bisexual/transgender (LGBT) rights, which have transformed family law, here and abroad.

The Universal Declaration of Human Rights, drafted in 1948, included the right to family life, and barred discrimination, including discrimination on the basis of sex. It was not until the 1960s, however, that these rights were set out in legally binding form, in the International Covenant on Civil and Political Rights⁴ (the “Civil Covenant”) and the International Covenant on Economic, Social and Cultural Rights⁵ (the “Economic Covenant”) and it was not until the 1970s that the Covenants came into force. In 1981, the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW” or the “Women’s Convention”) came into force.⁶ The United States has still not ratified the Economic Covenant or the CEDAW. In 2006, the Yogyakarta Principles were drafted, recognizing the equal rights of LGBT.⁷ The growth and spread of human rights affect virtu-

³ See, e.g., ELIZABETH MORGAN, *CUSTODY: A TRUE STORY* (1986) (doctor goes underground and is eventually jailed for refusing to disclose the location of her daughter to her allegedly abusive former spouse).

⁴ International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171. The United States did not ratify the ICCPR until 1992, after the collapse of the Soviet Union and the end of the Cold War.

⁵ International Covenant on Economic, Social and Cultural Rights, Jan. 8, 1976, 993 U.N.T.S. 3.

⁶ 19 I.L.M. 33 (1980).

⁷ Yogyakarta Principles, http://www.yogyakartaprinciples.org/principle_en_principles.htm; Jurisprudential Annotations to the Yogyakarta Principles at www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudential-annotation_s.pdf (last visited August 2, 2010). See also Michael O’Flaherty & John Fisher,

ally every aspect of family law. Domestic abuse, for example, not only violates American law, it is also recognized as a human rights violation.⁸

In addition, some issues, such as intercountry maintenance, require international cooperation. The United States ratified the Hague Maintenance Convention on September 29, 2010. Under Art. 60(1), the Maintenance Convention entered into force three months after the second ratification.⁹ Some states which are not parties to the Maintenance Convention rely on bilateral treaties to govern transnational maintenance. These treaties are also governed by public international law.

The internationalization of American family law has been spearheaded, as Merle Weiner has shown, by concern for children.¹⁰ It has been facilitated, and complicated, by the historical developments chronicled by Joanna Grossman and Lawrence Freedman,¹¹ by what Ann Estin describes as the “federalization” of family law, and by what David Meyers characterizes as the “constitutionalization” of family law.¹² But American family law, like family law everywhere, has also had to grapple with an ever-changing global order, or disorder. When globalization hits home, when it affects our most intimate relationships, we rely on IFL to resolve conflicts and protect the most vulnerable. This Article will briefly sketch some of the major developments in the internationalization of American family law during the past fifty years.¹³

Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles, 8 HUM. RT. L. REV. 207 (2008).

⁸ See, e.g., Kirk Semple, *Domestic Abuse Follows Afghans to New York*, N.Y. TIMES, Feb. 28, 2011 at 16 (describing the widespread domestic violence among recent immigrants.)

⁹ It is in effect, accordingly, between the U.S. and Norway.

¹⁰ Merle H. Weiner, *Codification, Cooperation, and Concern for Children: The Internationalization of Family Law in the United States Over the Last Fifty Years*, 42 FAM. L.Q. 619, 2008.

¹¹ JOANNA GROSSMAN WITH LAWRENCE FRIEDMAN, *INSIDE THE CASTLE* (2011).

¹² David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529 (2008).

¹³ This is not intended to be comprehensive. The development, legalization and distribution of the birth control pill began roughly fifty years ago, and had an enormous impact on American, and international, family law. See, e.g., Nicholas Bakalar, *First Mention: Birth Control Pills*, 1957, N.Y. TIMES, Oct. 26,

II. Child Abduction

Child abduction cases are the most frequently litigated issue in IFL. The United States, along with 81 other states, is a party to the Convention on the Civil Aspects of International Child Abduction (the "Abduction Convention").¹⁴ Member states of the Hague Conference become parties upon ratification; states that were not members in 1980 may accede to the Convention with the acceptance of the states parties.¹⁵ In 2003, judges from Australia, Canada, Ireland, New Zealand, United Kingdom and the United States met in Washington, D.C. to discuss "'best practices' to improve operation of the Abduction Convention."¹⁶

The Abduction Convention assumes that custody issues are best left to the courts of the child's place of habitual residence; it requires the prompt return of a child wrongfully removed to, or retained, in another state party. The United States ratified the Abduction Convention in 1988 and Congress enacted the International Child Abduction Remedies Act ("ICARA")¹⁷ to implement it. State courts and federal courts have concurrent subject matter jurisdiction over Abduction Convention proceedings; actions filed in state court may be removed to federal court by respondent.

A prima facie case of wrongful removal is made when a petitioner proves by a preponderance of evidence that:

2010 (describing the early debates regarding oral contraception.) While international developments in reproductive rights have certainly affected American law, and American policies, including the infamous "Gag Rule," have certainly affected international reproductive rights, reproductive rights have not involved the same kind of 'internationalization' as quickie divorces, child abduction, or adoption. This can be explained, in part, by the U.S. failure to ratify the international human rights instruments addressing these rights and in part by the availability of abortion domestically, even before *Roe*.

¹⁴ Hague Conference on Private International Law, 1980. T.I.A.S. No. 11,670, 1343 U.N.T.S. 89; 19 I.L.M. 1501. The United States is in a treaty relationship with 68 of the other states parties.

¹⁵ See, e.g., *Taveras v. Taveras*, 397 F. Supp. 2d 908 (S.D. Ohio 2005) (action by Dominican Republic parent dismissed because the United States had not yet accepted the accession of the Dominican Republic).

¹⁶ *The Common Law Judicial Conference on International Child Custody Best Practices* (hereafter "*Judicial Best Practices*") (available at http://travel.state.gov/abduction/resources/resources_548.html, last visited March 11, 2011.)

¹⁷ 42 U.S.C. § 11601(b)(1) (West 2001).

- 1) the habitual residence of the child immediately before the date of the alleged wrongful removal was in the foreign country;
- 2) the removal breached the petitioner's custody rights under the foreign country's law; and
- 3) the petitioner exercised custody of the child at the time of her alleged removal.¹⁸

"Habitual residence" is not defined in the Abduction Convention or in the Act. Rather, the definition has been left to the courts. As the U.S. Court of Appeals for the Third Circuit has held, a child's habitual residence is the place where he or she has been physically present for an amount of time "sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective."¹⁹ As the Court stressed, "a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there."²⁰

A child who has been wrongfully removed must be promptly returned to her habitual state of residence unless respondent can show by clear and convincing evidence that return would "expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;"²¹ the child objects to the return and is of "sufficient age and maturity" to do so;²² or return would not be permitted by "fundamental principles concerning the protection of human rights and freedoms"²³.

Because the Abduction Convention establishes a strong presumption favoring the return of a wrongfully removed child, exceptions are narrowly construed.²⁴ As the First Circuit has explained, this sets a high bar:

The text of Article 13 requires only that the harm be 'physical or psychological,' but context makes it clear that the harm must be a great deal more than minimal. Not any harm will do nor may the level of

¹⁸ 42 U.S.C. at § 11603(e)(1)(A).

¹⁹ *Feder v. Evans-Feder*, 63 F. 3d 217, 224 (3d Cir. 1995).

²⁰ *Id.*

²¹ Abduction Convention, Art. 13(b).

²² *Id.*, Art. 13.

²³ 42 U.S.C. at §11603(e)(2); Abduction Convention, Art. 20. For a cogent discussion of objections under Article 20 (fundamental freedoms), see Merle H. Weiner, *Using Article 20*, 38 FAM. L.Q. 583 (2004).

²⁴ *McManus v. McManus*, 354 F. Supp. 2d 62 (D. Mass., 2005).

risk of harm be low. The risk must be 'grave,' and when determining whether a grave risk of harm exists, courts must be attentive to the purposes of the Convention. For example, the harm must be 'something greater than would normally be expected on taking child away from one parent and passing him to another'; otherwise, the goals of the Convention could be easily circumvented.²⁵

In fact, a "grave risk" under 13(b) has generally been limited to cases in which there is a "sustained pattern of physical abuse" or a "propensity for violent abuse."²⁶

The Abduction Convention does not apply to children under sixteen, and the older the child, the more likely the child's objection is entitled to deference under Article 13. As set out in the authoritative commentary to the Abduction Convention, it "must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will."²⁷

In the alternative, a petition for return may be denied if respondent shows by a preponderance of evidence that more than one year has elapsed since the child's removal and the child is settled in her new environment; that petitioner does not really have 'custody' rights; or that petitioner has consented or acquiesced to the removal.²⁸

In accordance with its reservation to the Abduction Convention, the United States does not pay any expense in connection with the return of children from the United States, unless covered by a legal services program. Travel, counsel, and court costs are petitioner's responsibility, unless the court orders the child's

²⁵ *Walsh v. Walsh*, 221 F.3d 204, 218 (1st Cir. 2000).

²⁶ *See, e.g., Walsh v. Walsh*, 221 F.3d at 219-220 (holding that there was grave risk of harm in a case in which petitioner had severely beaten his wife over a number of years, including while she was pregnant; many of the beatings took place in front of her small children; and petitioner had a history of other violent activity and of chronic disobedience of court orders); *see also Danaipour v. McLarey*, (affirming district court finding of grave risk of psychological harm where petitioner had sexually abused one of the two children whose return was sought. *See generally Judicial Best Practices, supra* note 14 at para. 5, noting that, "It is in keeping with the objectives of the Abduction Convention to construe the Article 13b grave risk defense narrowly."

²⁷ Elisa Perez-Vera, *Explanatory Report on the 1980 Child Abduction Convention*, ¶ 30, at 433, in 3 HAGUE CONFERENCE ON PRIVATE INT'L LAW, Acts and Documents of the Fourteenth Session (1980).

²⁸ *Id.*

return, in which case the court shall order respondent to pay these expenses, unless “clearly inappropriate.”²⁹ Although the federal courts have split on the issue of mootness when a child is returned pending an appeal, the majority has considered the merits of an appeal even after the child’s return.³⁰ In 1999, to “promote mutual understanding, consistent interpretation and thereby the effective operation of the 1980 Convention”, the Permanent Bureau of the Hague Conference on Private International Law established the International Child Abduction Database (INCADAT). The database includes leading decisions of national courts regarding the Abduction Convention.³¹

A. *Non-Hague States*

Criminal prosecution may be initiated under the International Parental Kidnapping Act,³² but there is no civil remedy.³³ The State Department maintains a helpful web site for parents of children at risk of being abducted to non-Hague states, including most of the states in the Middle East with the exception of Israel.³⁴ A U.S. passport for a child under 16 will not be issued without the consent of both parents. Once a passport is issued, however, the child can be taken out of the country by anyone in

²⁹ 42 U.S.C. § 11607(b). *See, e.g.*, *Kufner v. Kufner*, 440 F. Supp. 2d 491 (D.R.I. 2007). (reducing request for over \$1 million to \$350,000 upon finding that the petitioner’s representation had excessive staffing and fees); *Cuellar v. Joyce*, 2010 WL 1816743 (9th Cir. 2010) (fees are appropriate even though petitioner was represented by pro bono counsel.)

³⁰ *See e.g.*, *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003) (although the child had already been returned to Scotland, the Scottish courts might enforce a U.S. court’s order to return the child); *see also, e.g.*, *Whiting v. Krassner*, 391 F.3d 540 (3rd Cir. 2004). *But see* *Bekier v. Bekier*, 248 F.3d 1051 (11th Cir. 2001) (dismissing an appeal from a return order as moot because the child had already been returned.) *Cf.* *March v. Levine*, 136 F.Supp. 2d 831 (M.D. Tenn.), *aff’d* 249 F.3d 462 (6th Cir. 2001) (staying the order of return pending resolution of the appeal).

³¹ <http://www.incadat.com/index.cfm?act=text.text&ing+1>, last visited April 19, 2011.

³² 18 U.S.C. §1204.

³³ *See, e.g.*, *Taveras v. Taveras*, 397 F.Supp. 2d 908 (S.D. Ohio 2005).

³⁴ An excellent and – still useful – guide for family lawyers involved in such cases appeared in these pages in 1997, Patricia E. Apy, *Managing Child Custody Cases Involving Non-Hague Contracting States*, 14 J. AM. ACAD. MATRIM. LAW. 77 (1997).

possession of that passport because the United States does not have exit controls on its borders for Americans with passports. Children with dual nationality, moreover, can travel on the non-U.S. passport.³⁵

B. *Ne Exeat Rights*

In its 2010 decision in *Abbott v. Abbott*,³⁶ the U.S. Supreme Court resolved the question of *ne exeat* rights, that is, whether the right to veto the removal of a child from the child's home country, without more, constituted a right of custody entitling the left-behind parent to the child's return. In *Abbott*, the British father and American mother moved to Chile with their son in 2002. In 2003, the parties separated and the Chilean court granted the mother sole custody and the father visitation. Under Chilean law, once visitation was awarded, the father's authorization was automatically required before the child could be taken out of the country.

While litigation was still pending in Chile, the mother took her son to Texas, where she filed for divorce in state court. The father filed suit in U.S. federal court, seeking the return of his son under the Abduction Convention and the Child Abduction Act. The U.S. Court of Appeals for the Fifth Circuit affirmed the denial of relief on the ground that a *ne exeat* right was not a right of custody.

The Supreme Court reversed. Taking into account the text of the Abduction Convention, the views of the State Department, decisions of foreign courts, and the purposes of the Convention, the Court held that a *ne exeat* right constituted a right of custody. The Court reasoned that since custody, as defined under the Convention, includes the right to determine the child's place of residence, the *ne exeat* right, which gave the father a veto, amounted to "decisionmaking authority regarding a child's relocation" and should therefore be considered a right of custody. As the dissent observed, this conflates the right of access, or visitation, with custodial rights.³⁷ It also has the anomalous result of

³⁵ See, e.g., <http://travel.state.gov/abduction/solutions> (last visited April 18, 2011).

³⁶ *S. Ct.* ___, 2010 WL 1946730 (U.S.).

³⁷ Stevens, J., dissenting.

returning a child to a country where there may be no custodial parent.

III. Marriage Recognition

The general rule in the United States is that if a marriage is valid in the state where it is entered into, it will be recognized everywhere. If a couple enters into a common law marriage in Texas, where such marriages are valid, for example, it will be recognized in New York, where they are not. The major exception to this rule is that foreign marriages valid under the law of the state in which they were entered into will not be recognized if such marriages are against the public policy of the recognizing state. Recognition may also depend on the purpose for which it is sought. In *In re Dalip Singh Bir's Estate*, for instance, a polygamous foreign marriage was recognized in order to ascertain a child's inheritance rights.³⁸

A. The 1977 Convention

There is a treaty governing recognition of foreign marriages, the 1977 Hague Convention on Celebration and Recognition of the Validity of Marriages,³⁹ but the United States is not a party. Thus, the issue is usually left to the laws of the fifty states. Issues of foreign law in such cases are treated as questions of fact in U.S. courts.

B. Same-sex Marriage

In 1996, Congress passed the Defense of Marriage Act (DOMA).⁴⁰ Under DOMA, first, no state is required to recognize a same-sex marriage entered into in another state. Second, for purposes of federal legislation, administrative rulings, and regulations, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."⁴¹

³⁸ 83 Cal. App. 2d 256, 188 P.2d 499 (1948).

³⁹ See *Special Symposium: International Marriage and Divorce Regulation and Recognition*, 29 FAM. L.Q. 497 (1995).

⁴⁰ 28 U.S.C. §1738C (2000).

⁴¹ 1 U.S.C. §7.

DOMA has been challenged in federal courts under the Tenth Amendment with mixed results. The U.S. Bankruptcy Court in Washington, D.C., held that a lesbian couple who had married in Canada was not a married couple able to file a joint petition under DOMA and U.S. bankruptcy law.⁴² Debtors argued that DOMA violated the Tenth Amendment by infringing upon the states' power to regulate marriage. The Court concluded that the amendment was "not implicated because the definition of marriage in DOMA is not binding on states and, therefore, there is no federal infringement on state sovereignty."⁴³ Rather, while DOMA was dispositive for purposes of federal bankruptcy law, "states retain the power to decide for themselves the proper definition of the term."⁴⁴

On February 23, 2011, the Obama Justice Department advised that it would no longer defend the constitutionality of DOMA, although the law would remain on the books.⁴⁵ The impact of this on international cases is an open question.⁴⁶

IV. Immigration

Immigration cases often involve family law issues because immigration and citizenship rights are often determined by family relationships.⁴⁷ In general, the spouse or child of a U. S. citizen is allowed to enter and remain in the United States. But a broad and variable range of attitudes towards immigration is reflected in the range of laws addressing families over the past 50 years, from the blatant exclusion of Japanese wives,⁴⁸ to a 2001

⁴² *In re Lee Kandu and Ann C. Kandu*, Debtors, 315 B.R. 123, Bankr. L. Rep. p 80, 145 (2004).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Statement of the Attorney General on Litigation involving the Defense of Marriage Act, Feb. 23, 2011.

⁴⁶ See generally, Nancy Levit, *Cohabitation, Domestic Partnerships, and Nontraditional Families Annotated Bibliography*, 22 J. AM. ACAD. MATRIMONIAL LAW. 169, 204-206 (2009)(setting out international sources).

⁴⁷ See, e.g. Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage? Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273 (2003).

⁴⁸ This followed the U.S. occupation of Japan after World War II. Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Regulation of Interracial Marriages*, __ NYU L. REV. __ (2011).

Supreme Court decision upholding different standards for children born abroad, depending on the sex of their citizen parent.⁴⁹

A. Marriage

State law determinations as to the existence (or not) of a marriage are not controlling in this context. That is, a couple may be considered married under the laws of New York or California, but not married for purposes of federal immigration law. Two federal laws specifically address the issue of immigrant marriage. The federal Immigration Marriage Fraud Amendments⁵⁰ were passed in 1986. If an alien has been married to a citizen for less than two years, the alien is only granted conditional permanent resident status. Within ninety days of the expiration of that status, the alien and the citizen must jointly petition for permanent status. Courts have rejected challenges to the Immigration Marriage Fraud Amendments on grounds of due process and equal protection.⁵¹

Some of these immigrant marriages involve “mail-order brides.”⁵² In response to growing concerns about domestic violence and trafficking, Congress enacted the International Marriage Broker Regulation Act of 2005.⁵³ The Act requires marriage brokers to provide future brides, who must be over eighteen, with information about American law and immigrants’ rights. This must include information about domestic violence and sexual assault laws, public and private services, and battered women’s shelters. The Act also requires marriage brokers to provide information to future brides about their future husbands,

⁴⁹ See, IV. B. *Children*, *infra*.

⁵⁰ 8 U.S.C. §1154(h) 1255(e).

⁵¹ See *Azizi v. Thornburgh*, 908 F.2d 1130 (2d Cir. 1990); *Bright v. Parra*, 919 F.2d 31 (5th Cir. 1990); *Gomez-Arauz v. McNary*, 746 F. Supp. 1071 (W.D. Okla. 1990); *Anetekhai v. INS*, 876 F.2d 1218 (5th Cir. 1989); *Almario v. Attorney General*, 872 F.2d 147 (6th Cir. 1989).

⁵² It was estimated in 2007 that between 9,500 and 14,000 foreign women are matched with American men by marriage brokers every year. Kirsten Lindee, *Love, Honor or Control: Domestic Violence, Trafficking, and the Question of How to Regulate the Mail-Order Bride Industry*, 16 COLUM. J. GENDER & L. 551, 552 (2007). See also Karen Morgan, Note, *Here Comes the Mail-Order Bride: Three Methods of Regulation in the United States, the Philippines, and Russia* 39, GEO. WASH. INT’L L. REV. 423 (2007).

⁵³ See 8 U.S.C. § 1375a.

including any criminal records, civil protection orders, arrests or restraining orders. The Act has been upheld against challenges from marriage brokers.⁵⁴

B. *Children*

Claims have been made on behalf of citizen children, born in the United States, as well as by children born abroad of citizen parents. Claims on behalf of citizen children challenging the deportation of their parents have generally been denied. Courts have reasoned that parents decide where a child lives and it is their choice whether to take the child with them or leave the child with foster parents in the United States. Even if they take the child, he or she can return to the United States upon attaining majority.⁵⁵

In *Nguyen v. Immigration and Naturalization Service*,⁵⁶ the Supreme Court upheld 8 U.S.C. §1409, which imposes different requirements for a child born outside of the United States to an unmarried U.S. citizen, depending upon whether the citizen parent is the mother or the father. Because the petitioner's citizen father had not met the requirements of the Act relating to acknowledgement of paternity while petitioner was under 18, petitioner was not eligible for citizenship. The Court reasoned that because maternity was more readily ascertained, a different standard for establishing paternity was not discriminatory. The Court seemed particularly concerned about the numbers of young men in the armed services stationed abroad, and the possibility that paternity claims would overwhelm the system.

⁵⁴ See, e.g., *European Connections & Tours v. Gonzales*, 480 F. Supp. 2d 1355 (N.D. Ga. 2007).

⁵⁵ STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 628 (3rd ed. 2002). See INA § 240A(b)(1)(D). See generally e.g., *Iturribarria v. INS*, 321 F.3d 889, 902 (9th Cir. 2003) (noting that the adjustment difficulties children experience when accompanying a deported parent do not constitute exceptional and extremely unusual hardship); *In re Montreal*, 23 I. & N. Dec. 56 B.I.A. 2001) (finding no exceptional hardship where deportee's children would be forced to follow father and deportee's parents would be left behind).

⁵⁶ 533 U.S. 53, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001).

V. Asylum

Like immigration, asylum cases frequently involve family law issues. The threat of coerced female genital surgeries, sterilization, or marriage have all been found sufficient for a claim of asylum.⁵⁷ In *Xiao Ji Chen v. Gonzales*,⁵⁸ for example, the Court of Appeals for the Second Circuit noted that the Board of Immigration Appeals (BIA) has “recognized that coerced sterilization [should be] viewed as a permanent and continuing act of persecution.” The Court also explained that coercive family planning was properly treated as persecution on the basis of political opinion

A. Female Genital Surgeries (FGS)

Human rights advocates have long demanded an end to FGS, the circumcision of girls as a rite of passage. It has been condemned as a violation of children’s rights and as a form of torture. Thus, it serves as a ground for asylum, even when it has already been performed, and represents no future threat. As the Ninth Circuit observed in *Mohammed v. Gonzales*:

The Courts recognize FGS as a form of “persecution” within the meaning of our asylum law. As the Seventh Circuit has written, the mutilation of women and girls is ‘a horrifically brutal procedure, often performed without anesthesia’ that causes both short- and long-term physical and psychological consequences. The practice has been internationally recognized as a violation of the rights of women and girls. Within the United States, the practice of genital mutilation of female minors has been prohibited by federal law since 1996 . . . In making such mutilation a criminal offense, Congress found that the procedure ‘often results in the occurrence of physical and psychological health effects that harm the women involved.’

* * *

The government argues . . . that Mohamed cannot be eligible for asylum because she has already suffered genital mutilation and therefore, ‘there is no chance that she would be personally tortured again by the procedure.’

* * *

⁵⁷ See, e.g., *Nwaokolo v. INS*, 314 F.3d 303, 308-10 (7th Cir. 2002) (granting a stay of petitioner’s removal upon a showing that petitioner’s daughter might be subject to female genital mutilation in petitioner’s native Nigeria).

⁵⁸ 434 F.3d 144 (2d. Cir. 2006) (denying relief notwithstanding statement of rule, for the reason that petitioner had failed to meet her burden of proof).

[L]ike forced sterilization . . . persecution in the form of FGM, must be considered a continuing harm that renders a petitioner eligible for asylum, without more.⁵⁹

While there are few defenders of the practice in the West, several commentators have cautioned against punishing the victims.⁶⁰ They note that the procedure encompasses a range of practices, from the removal of the external genitalia to more symbolic and less invasive procedures; that it is a rite of passage through which a girl becomes a member of her social group; and that within some groups, a girl is considered 'unclean' and thus ineligible for marriage unless she has undergone FGS. Finally, they point out that sanctions against the practice, including its criminalization in many Western countries, merely drives it underground and deters women who have undergone FGS from seeking medical attention. Rather, they argue for a coordinated approach, including grassroots education and consultation with those who actually perform the surgeries.

B. *Domestic Violence*

The Violence Against Women Act, enacted in the United States in 1994, amended the Immigration and Nationality Act to allow victims of domestic violence to leave their abusive partners and sponsor their own applications for permanent residence.⁶¹ Amendments also allow 'cancellation of removal' for victims of domestic violence in cases of extreme hardship.⁶²

⁵⁹ *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005). See generally, Kimberly Sowders Blizzard, Note, *A Parent's Predicament: Theories of Relief for Deportable Parents of Children Who Face Female Genital Mutilation*, 91 CORNELL L. REV. 899 (2006).

⁶⁰ See generally, e.g., Isabelle Gunning, *Arrogant Perception*, *World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L.REV. 189 (1991); Hope Lewis, *Between 'Irua' and Female Genital Mutilation*, 8 HARV. HUM. RTS. J. 1 (1995).

⁶¹ 8 U.S.C. § 1154(a)(a).

⁶² 8 U.S.C. § 1229(b)(a). See Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529 (2004).

VI. Divorce

Unlike most areas of IFL, cases involving the recognition of foreign divorces have probably decreased over the past fifty years. In the 1960s, the difficulty of obtaining a divorce in most American jurisdictions made mail-order divorces or ‘quickie’ divorces popular.⁶³ The first no-fault divorce law was passed in 1969 in California.⁶⁴ By 2010, with the passage of no-fault in New York, it was an option in all fifty states.⁶⁵ There is no reason for American couples to seek divorces abroad when they can obtain them at home, especially since the latter, unlike the former, are entitled to full faith and credit.

But for couples in which one of the parties is a foreign national, foreign divorces may still be appealing. The United States is not a party to the 1970 Convention on the Recognition of Divorces and Legal Separations.⁶⁶ The claims of parties relying on foreign judgments, accordingly, are addressed under the judicial doctrine of comity.⁶⁷ The doctrine generally gives courts wide

⁶³ See, e.g., *Domestic Recognition of Divorce Decree Obtained in Foreign Country and Attacked for Lack of Domicile or Jurisdiction of Parties*, 13 A.L.R. 3d 1419 (1967).

⁶⁴ IRA ELLMAN ET AL., FAMILY LAW (5th ed. 2010).

⁶⁵ Effective Oct. 12, 2010, New York added no-fault grounds to its divorce law. The new law provides in pertinent part:

Section 170 of the domestic relations law is amended by adding a new subdivision 7: (7) The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath.

No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts’ fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce.

N.Y. DOM. REL. §170(7)(McKINNEY 2010).

⁶⁶ Hague Conference on Private International Law, 1970. 978 U.N.T.S. 993, 1975 U.K.T.S. 123, Cmnd. 6248.

⁶⁷ See *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139 (1895) (noting that, “‘Comity’ . . . is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another. . . .”).

discretion. In this context, however, there are some clear parameters. As set out in the *Restatement (Third) of Foreign Relations Law of the United States*: "Courts in the United States will recognize a divorce granted in the state in which both parties to the marriage had their domicile or their habitual residence at the time of divorce and valid and effective under the law of that state."⁶⁸ Where both parties did *not* reside in the state granting the divorce, recognition is left to the discretion of the U.S. court, as the Restatement illustrates:

(2) Courts in the United States may, but need not, recognize a divorce, valid and effective under the law of the state where it was granted,

(a) if that state was, at the time of divorce, the state of domicile or habitual residence of one party to the marriage; or

(b) if the divorce was granted by a court having jurisdiction over both parties, and if at least one party appeared in person and the other party had notice of and opportunity to participate in the proceeding.

(3) A court that would not recognize a divorce that is within Subsection 2(a) or 2(b) may nevertheless recognize such a divorce if it would be recognized by the state where the parties were domiciled or had their habitual residence at the time of the divorce.⁶⁹

VII. Maintenance

In 1996, Congress enacted the International Support Enforcement Act,⁷⁰ which provides in pertinent part that the Secretary of State is authorized to declare any foreign country a "foreign reciprocating country" if it "has established, or undertakes to establish, procedures for the establishment and enforcement of duties of support owed to obligees who are residents of the United States."⁷¹ Subsection (d) of the Act provides: "States may enter into reciprocal arrangements for the establishment and enforcement of support obligations with foreign countries, to the extent consistent with Federal law."⁷² The statute was passed in recognition of the difficulties of pursuing support orders across national boundaries and aimed to "allow and encourage the Sec-

⁶⁸ §484 Recognition of Foreign Divorce Decrees.

⁶⁹ *Id.*

⁷⁰ 42 U.S.C. § 659a

⁷¹ 42 U.S.C. § 659a(a)(1).

⁷² *Id.* § 659a(d).

retary of State to pursue reciprocal support agreements with other nations.”⁷³

As noted above, the Senate has ratified the Maintenance Convention.⁷⁴ The implementing legislation for the Maintenance Convention is set out in the 2008 amendments to the Uniform Interstate Family Support Act (UIFSA), which were drafted to incorporate the relevant provisions of the Maintenance Convention regarding procedures for registration, recognition, enforcement and modification of orders from foreign countries that become parties. Even without the Maintenance Convention, U.S. courts may recognize foreign judgments under the doctrine of comity. Thus, a U.S. court may defer to a foreign court where a support action is pending rather than proceed with litigation.⁷⁵

VIII. Adoption

The United States signed the Intercountry Adoption Convention in 1994 (the Adoption Convention) and enacted implementing legislation in 2000.⁷⁶ The Adoption Convention did not come into force in the United States until 2008, however, when the implementing regulations were completed and the providers accredited.

Fifty years ago, international adoption was in its earliest stages in the United States. It began after World War II, in response to orphaned and displaced children, and surged after the Korean War. In 1961, the Immigration and Nationality Act incorporated, for the first time, provisions for the international adoption of foreign-born children by U.S. citizens.⁷⁷ By 2004, roughly 23,000 children from other countries were adopted annually in the United States. Because of changing attitudes, including resistance on the part of sending countries to ‘exporting’ their

⁷³ 1996 U.S.C.C.A.N. 2495. *See generally*, William Duncan, *The Development of the New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, 38 FAM. L.Q. 663 (2004). A list of “foreign reciprocating countries” is available on the website of the Department of State at www.travel.state.gov.

⁷⁴ *See* note 8, *supra*.

⁷⁵ *See, e.g.*, *Diorinou v. Mezitis*, 237 F.3d 133, 139-40 (2nd. Cir. 2001).

⁷⁶ Intercountry Adoption Act of 2000 (IAA), 42 U.S.C. § 14901 et seq.

⁷⁷ <http://pages.uoregon.edu/adoption/timeline.html>, last visited April 19, 2011.

children, and changing laws, including what some regard as the onerous requirements of the Adoption Convention, intercountry adoptions by Americans decreased to 11,059 in 2010.⁷⁸

Rather than setting forth detailed substantive law, the Adoption Convention takes into account the different approaches of state parties to issues such as independent adoptions, the use of private intermediaries and the disclosure of identifying information. These differences are resolved by allocating responsibility for different stages of the adoption process to the sending or receiving state. In addition, the Adoption Convention allows either state to veto the action of the other at various points during the process, or under the comprehensive veto power of Art. 17(c), which requires the Central Authorities of both states to affirmatively agree that the adoption should proceed.

Chapter I sets forth the scope of the Convention, which applies to adoptions involving residents of different contracting states. Chapter I also clarifies the Convention's objectives, specifically, "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."⁷⁹ Chapter II establishes the requirements for intercountry adoptions, including, importantly, a determination "that an intercountry adoption is in the child's best interest . . . *after* possibilities for placement of the child within the state of origin have been given due consideration." (emphasis added).⁸⁰ This provision reflects the assumption that it is in the child's best interest to remain in her country of origin, if she can be properly cared for there. Unlike the Convention on the Rights of the Child, however, the Hague Convention assumes that it is better for a child to be adopted abroad than raised in an institution in her country of origin.⁸¹

Chapter II further requires the freely given consent, after counseling if needed, of all persons "whose consent is necessary," including that of a mature child. It expressly prohibits "payment or compensation of any kind" to induce such consents. These provisions prevent the kind of problems that followed the U.S.

⁷⁸ 114 Stat. 829 requires an Annual Report.

⁷⁹ Art. 1(a).

⁸⁰ Art. 4(b).

⁸¹ Convention on the Rights of the Child, Art. 21.

'Operation Baby Lift' at the end of the war in Vietnam. Babies were 'rescued' from orphanages in the final days of the war and placed with families in the United States. It was later discovered that many of these babies had been placed in orphanages by their families with the understanding that such placement would be temporary, and that the child would be returned to its family when it was safe. The premature 'rescue' of these children resulted in several lawsuits, and courts ordered some of these babies returned to their biological parents.⁸²

Finally, Chapter II addresses the placement of the child in the receiving state (Art. 5), requiring that the competent authorities of that state "have determined that the prospective adoptive parents are eligible and suited to adopt" and that the children will be "authorized to enter and reside permanently in that State."⁸³

Chapter III requires the contracting state to designate a Central Authority which will carry out the state's duties under the Adoption Convention. This allows other states, as well as agencies and prospective adoptive parents, to know who they should be dealing with in what is often a complex bureaucracy. The Central Authority is also responsible for providing information regarding national adoption laws and otherwise cooperating with their counterparts in other contracting states. This includes the duty to "reply, in so far as is permitted by the law of their state, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation."⁸⁴

The Central Authority is ultimately responsible for ensuring that adoptions proceed in accordance with Chapter IV of the Convention. These duties may be delegated to other public authorities or "duly accredited" bodies, such as private adoption agencies. Under Art. 22(2), a state may declare that these functions may also be performed by other 'qualified' bodies or persons, such as lawyers or social workers. A sending state may specify, however, that adoption of its children may only take

⁸² *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1197 (9th Cir. 1975); *Huynh Thi Anh v. Levi*, 427 F. Supp. 1281 (E.D. Mich. 1977); *Hao Thi Popp v. Lucas*, 438 A.2d 755 (Conn. 1980).

⁸³ Art. 5.1(c).

⁸⁴ Art. 9(e).

place where such functions are performed by public or accredited bodies.

The procedural requirements set out in Chapter IV include the preparation of a report about the applicants “including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.”⁸⁵ This report is to be prepared by the Central Authority of the receiving state. After determining that a child is adoptable, the central Authority of the child’s state of origin is required to “transmit to the Central Authority of the receiving state its report on the child, . . . taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed.”⁸⁶

Violations of the Adoption Convention and its implementing legislation have been claimed in several wrongful adoption suits. In *Harshaw v. Bethany Christian Services*,⁸⁷ for example, the court recognized a cause of action for negligent non-disclosure brought by adoptive parents of a Russian child with possible fetal alcohol syndrome. In *Moriarity v. Small World Adoption Foundation of Missouri, Inc.*,⁸⁸ similarly, the court denied defendant agency’s motion for summary judgment on plaintiff’s claims of fraud, wrongful adoption, breach of contract, negligence, and negligent misrepresentation in an action by adoptive parents of a Ukrainian child with cerebral palsy, a condition that was known but not revealed to the prospective adoptive parents.

IX. Conclusion

As the United Nations has pointed out, families are the primary unit of social organization. In these tumultuous times, families are changing, trying to adapt to new demands and taking advantage of new mobility. The practice of family law has be-

⁸⁵ Art. 15.

⁸⁶ Art. 16(d).

⁸⁷ 2010 WL 2169629 (W.D. Mich. May 28, 2010).

⁸⁸ 2008 WL141913 (N.D.N.Y., Jan. 11, 2008)

come internationalized. American lawyers must be prepared to help clients whose families, and family law problems, extend beyond national boundaries.⁸⁹

⁸⁹ See, e.g., Mary Kay Kisthardt & Barbara Handschu, *Recent Conventions Will Affect Family Law Practices*, NAT'L L.J., col. 33, Feb. 21, 2011 (explaining differences between the Child Protection Convention and the UCCJEA).

