REPORT

Introduction

The ABA Section of Family Law submits this Report in support of the Recommendation that the United States become a party to the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (the Convention). [1] Specifically, the Recommendation urges the United States Senate to give its advice and consent to ratification of the Convention, and the United States Congress to enact the necessary implementing legislation. The Convention was concluded at The Hague on November 23, 2007, after nearly five years of negotiation, and the United States signed it the same day.

The Departments of State and Health and Human Services (HHS) have indicated that they expect that the Convention will be submitted to the Senate for ratification in June or July 2008, and that the proposed federal implementing legislation will be submitted to the Congress for its consideration at the same time. The National Conference of Commissioners on Uniform State Laws (NCCUSL) has likewise informed us that the amendments to the Uniform Interstate Family Support Act (UIFSA) necessary to implement the Convention at the state level will be presented to NCCUSL for approval at its July 2008 annual meeting.

Endorsement of this Convention is consistent with ABA support for previous Hague conventions that address family protection matters, including the 1980 Convention on the Civil Aspects of International Parental Child Abduction, the 1993 Convention on Intercountry Adoption and the 1996 Protection of Children Convention.

The Negotiation

Given the importance of this topic to U.S. families, and because the number of transnational cases being handled by U.S. child support workers will continue to increase, the United States was one of the most active participants in the negotiation of the Convention. There is general agreement that a new convention is necessary to modernize and improve the international system for the recovery of child support.

The formal negotiation of this Convention began under the auspices of the Hague Conference on Private International Law in May 2003 and concluded with the adoption of the text of the Convention at a Diplomatic Conference that took place November 5-23, 2007 in The Hague. About 60 countries, plus numerous intergovernmental and non-governmental organizations, were represented in these negotiations. All U.S. child support interests were active participants in this negotiation. In addition to officials from HHS and the State Department, U.S. delegates to the negotiation included active members of the ABA Sections of Family Law and International Law, the Chair and Reporter of the NCCUSL UIFSA Drafting

[1] A copy of the Convention is available at www.hcch.net/index_en.php?act=conventions.text&cid=131. An optional Protocol on the Law Applicable to Maintenance Obligations was adopted at the same time as the Convention was adopted. The United States does not intend to become a party to the Protocol.

Committee, the directors of several U.S. state child support agencies, and leadership of the National Child Support Enforcement Association (NCSEA).

The Intent and Benefits of the Convention

Every child deserves the support of both of the child's parents. However, ensuring the enforcement of child support obligations is particularly difficult in transnational cases. While U.S. courts will recognize and enforce foreign child support decisions on the basis of comity, many countries do not reciprocate in the absence of a treaty obligation. Even in cases where there are no legal obstacles to enforcing child support obligations across international boundaries, the practical problems often mean that little or no support ever reaches the custodial parent and child.

The Convention provides for a comprehensive system of cooperation between the child support authorities of Contracting States, requires Contracting States to establish child support decisions for applicants living in other Contracting States (subject to the jurisdictional and certain other rules of the requested State), establishes uniform procedures for the recognition and enforcement of foreign child support decisions, and requires effective measures for the prompt enforcement of maintenance decisions.

This Convention contains numerous groundbreaking provisions that will, for the first time on a world-wide scale, establish uniform, simple, fast, and inexpensive procedures for the processing of international child support cases. While similar procedures already are the norm in the United States, establishing them as the internationally agreed global standard represents a considerable advance on prior child support conventions, which leave many of these procedures to be regulated largely by each country's national law. The United States is not a party to any of these prior conventions.

A major benefit of ratification for the United States will be reciprocity: As noted above, U.S. courts and child support agencies already recognize and enforce foreign child support obligations in many cases whether or not the United States has a child support agreement with the foreign country. Many foreign countries will not process foreign child support requests in the absence of a treaty obligation. Thus, ratification of the Convention will mean that more children residing in the United States will receive the financial support they need from their parents, wherever the parents reside.

Implementation of the Convention in the United States

The Convention will not affect intrastate or interstate child support cases in the United States. It will only apply to cases where the custodial parent and child live in one country and the non-custodial parent in another. The Convention is largely consistent with current U.S. law and, in fact, many of its provisions are modeled on UIFSA. International child support cases within the scope of the Convention are already processed under existing federal and state law and practice and compliance with our obligations under the Convention will require minimal changes to existing law.

In order for the Convention to be implemented, however, certain conforming amendments to existing federal legislation, as well as some amendments to the relevant uniform state law, will be required. As explained above, the federal implementing legislation has been drafted and will be submitted to the Congress this summer. NCCUSL is currently drafting the amendments to UIFSA and those amendments will be presented to the Conference for adoption in July 2008. Current federal law, enacted in 1996, mandates that U.S. states and territories adopt the current version of UIFSA as a condition for continued receipt of federal funds, which reimburse the states for two-thirds of the costs of administering the states' child support programs. Federal approval of a state's child support program also is a condition for funding of the state's Temporary Assistance for Needy Children (TANF) program. Thus, UIFSA is currently in force in all U.S. states, plus the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam. The proposed federal implementing legislation for this Convention will require the states and territories to adopt, within two years, the new version of UIFSA, which will incorporate changes required by the proposed Convention, in order to continue to receive federal funds.

To ensure that we are fully able to comply with our obligations, the United States will not deposit its instrument of ratification until all the necessary changes to federal law have been enacted and the UIFSA amendments have been adopted by all U.S. jurisdictions.

Summary of the Convention

Chapter I of the Convention (Articles 1-3) addresses the object and scope of the Convention and key definitions. The Convention will apply on a mandatory basis to child support obligations and to the recognition and enforcement of spousal support orders when the application is made in conjunction with a claim for child support. This is consistent with the scope of the federally funded U.S. child support program, which requires state child support agencies to provide services to applicants seeking spousal support if there is also a request for child support from the same applicant involving the same debtor. In addition, with the exception of Chapters II and III (which require services by Central Authorities), the Convention applies to the establishment and modification of spousal support even in cases where there is not a related request for child support. This is acceptable to the United States because state child support agencies (which will perform most of the Central Authority responsibilities under the Convention) are not required to provide services in spousal-only cases. Applicants in spousal-only cases will thus be able to go directly to the competent authority (i.e., the court or administrative tribunal) with a request under the Convention, but will not be able to apply for Central Authority assistance in the processing of their request. States may declare that they will extend all or part of the Convention to other family support obligations. As there is no uniform federal or state program in the United States with regard to support obligations for other types of family relationships, the State Department and HHS are not recommending that the United States make such a declaration.

Chapter II (Articles 4-8) provides detailed provisions on administrative cooperation between Central Authorities, including designating which functions can be delegated to other public bodies. The United States intends to designate the Secretary of the Department of Health and Human Services as the Central Authority under this Convention. The HHS Office of Child

Support Enforcement (OCSE), which has primary responsibility within the federal government for child support matters, will handle the Central Authority responsibilities at the federal level. Most of the Central Authority responsibilities for individual cases will be delegated to the state child support agencies. While the United States is not a party to any multilateral child support convention, we are a party to a number of federal-level bilateral child support agreements. In addition, individual U.S. states have informal child support reciprocity arrangements with a number of foreign countries. The division of Central Authority responsibilities between the federal government and the states will be generally the same under the multilateral Convention as it is now for international cases.

Chapter III (Articles 9-17) sets out the rules governing applications made under the Convention through Central Authorities (rather than direct applications made either *pro se* or through a private attorney to the competent authority). The available applications include applications to establish a child support decision, recognize and enforce an existing decision, or modify a decision. Articles 14-17 deal with the important issue of the cost of services (including legal assistance and genetic testing) under the Convention for child support applicants who use the Central Authority system. As most child support applicants are people of modest means, who would be unable to pursue recovery of child support if they had to pay high fees, including for legal services, cost-free services is a key to the success of the Convention. The Convention does provide no-cost services to child support creditors who use the Central Authority system, with very few exceptions.

Chapter IV (Article 18) sets down rules to limit the circumstances in which one State can modify the decision of another State. This article is similar to one in UIFSA.

Chapter V (Articles 19-31) provides an efficient procedure for the widest recognition of existing decisions. Along with the rules for cost-free services, the recognition and enforcement rules are key to the success of the Convention. The Convention provides for a streamlined, transparent process that is very similar to the process under UIFSA. Article 19 provides that Chapter V applies to applications transmitted between Central Authorities as well as to requests sent directly to a competent authority.

Article 20 deserves a detailed analysis, as it contains the jurisdiction rules that are part of the core of the Convention, and because some of these rules initially raised concerns for the United States during the negotiation. Article 20(1) requires the recognition and enforcement of a decision made by a Contracting State if it is enforceable in the State of origin and if one of the following listed bases for jurisdiction is present: (a) the respondent was habitually resident in the State of origin at the time proceedings were instituted; (b) the respondent has submitted to jurisdiction; (c) the creditor was habitually resident in the State of origin at the time proceedings were instituted; (d) the child for whom maintenance was ordered was habitually resident in the State of origin, provided that the respondent has lived with the child in that State or has resided in that State and provided support for the child there; (e) except in child maintenance matters, the parties have made a written agreement to jurisdiction; or (f) the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties.

In response to serious U.S. concerns about some of these jurisdictional rules, the negotiators agreed to include Article 20(2) in the Convention. Pursuant to that Article, a State may make a reservation with respect to three of the bases of jurisdiction set forth under Article 20(1): creditor-based jurisdiction, jurisdiction based on a written agreement, or jurisdiction based on a matter of personal status or parental responsibility. The Department of State and HHS intend to recommend that the United States make a reservation in respect of Article 20(1)(c), (e), and (f) because those provisions are not consistent with U.S. law on the minimum contacts required for jurisdiction in order to satisfy constitutional due process requirements.

The 20(1)(c) basis for jurisdiction – the fact that the creditor resides in the forum State - is a common one in nearly all countries, but not the United States. In the United States, under current Supreme Court jurisprudence, the mere fact that the creditor resides in the forum does not give the forum jurisdiction over the debtor in a child support case. In order to satisfy our due process standards, there must be a nexus between the debtor and the forum in order to give the forum jurisdiction over the debtor. In other words, it is the respondent's (debtor's) contacts with the forum, not the petitioner's (creditor's), that are determinative. *Kulko v. Superior Court*, 436 U.S. 84 (1978).

Article 20(1)(e) requires a competent authority to recognize and enforce a support decision, other than one for child support, if the parties have agreed in writing to the issuing State's jurisdiction. In the United States, such an agreement would be unenforceable if the parties had agreed to jurisdiction by a forum that has no nexus with either party.

Finally, Article 20(f) requires a competent authority to recognize and enforce a support decision where the issuing authority exercised jurisdiction on a matter of personal status or parental responsibility. In the United States, a competent authority must have personal jurisdiction over the parties. The fact that a court has *in rem* jurisdiction over a marriage, for example, does not mean that the court has personal jurisdiction over the parties. Without the requisite minimum contacts for personal jurisdiction, a U.S. court cannot issue a valid order.

Chapter VI (Articles 32-35) provides that, while enforcement shall take place in accordance with the law of the State addressed, it shall be prompt and effective.

Chapter VII (Article 36) describes the circumstances under which a public body can seek reimbursement of child support owed to a custodial parent when the public body has provided benefits to that parent in lieu of child support.

Chapters VIII (Articles 37-57) and IX (Articles 58-65) include general and final provisions.

As the United States is not a party to any of the prior maintenance conventions, while many other countries are parties to one of them, one of the main reasons for the negotiation of this Convention was to adopt a Convention that the United States would join. Thus, many countries made it clear that they expected the United States to take the lead in rapid ratification of the Convention. The United States showed its intent by signing the Convention on the day it was adopted. It will be important for the overall success of the Convention for the United States

to complete all the steps (ratification and implementing legislation) necessary for it to carry out the Convention's obligations as quickly as possible. As the Convention requires only two parties for entry into force (Article 60(1)), early U.S. ratification and implementation will likely hasten entry into force of the Convention.

Respectfully submitted by:

Gregg M. Herman
Chair
August 2008