

# Why Teach International Family Law in Conflicts?

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## ABSTRACT

*Professor Reynolds sets forth a challenge to conflicts professors: to teach international family law in their conflict of laws classes. At present, many conflicts professors avoid teaching international family law, in part because the study of this subject is complicated by several statutes addressing particularly difficult issues. Ignoring international family law is unwise, because many United States citizens and lawyers are likely to confront such problems.*

*Moreover, this Article suggests several additional reasons for including international family law in the general conflicts course. First, litigants entangled in divorce and custody proceedings with international complications face high financial and emotional costs; knowing how to assist a client embroiled in such a matter is therefore important. Second, the topic of international family law provides considerable material beyond the reach of the Full Faith and Credit Clause of the United States Constitution; as such, this topic regularly raises questions regarding the enforcement of judgments from foreign countries. Third, the topic raises innumerable cross-cultural questions that require students to examine United States policy. Fourth, this cross-cultural nature of international family law exposes students to other cultures and to writings of non-conflicts scholars. This interdisciplinary perspective on conflicts "solutions" raises fundamental questions about the scholarship on conflict of laws. Finally, international family law provides interesting*

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*material for reviewing an array of conflicts issues. Thus, Professor Reynolds invites conflicts professors to tap the vast unmined vein of international family law to improve their conflicts courses.*

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The issue I have been asked to address—why law school professors should teach international family law as part of the conflicts course—really consists of three separate questions. Accordingly, this essay is divided into three parts; the fourth part is a brief pedagogic conclusion.

#### I. WHY TEACH INTERNATIONAL CONFLICTS MATERIALS?

The conflicts course has been hidebound for many years. The basic troika of jurisdiction, choice of law, and judgments gets covered well enough, but the overwhelming emphasis is on United States law. Both the conflicts casebook and the professor usually give only a passing reference to international problems.

That chauvinism is unwise in today's world. No longer is international litigation conducted only by Wall Street mega-firms; practitioners everywhere and anywhere may find themselves immersed in the intricacies of taking a deposition in Belgium, applying Korean contract law in a Maryland state court, or enforcing a Greek judgment in a federal court in Tennessee. Unfortunately, few schools offer, and even fewer wannabe litigators take, specialized courses in international litigation. Law professors do their students a disservice if they do not expose

them to international materials in conflicts, the most likely general course for exposure to this topic.

International conflicts materials also provide a valuable contrast to the way things are done in the United States. We American conflicts scholars are a particularly parochial lot; obsessed with fascinating trivia such as what Brainerd Currie really meant, American conflicts scholars focus on their own narrow view of the world. The rest of the world, the Europeans in particular, have been dealing with these problems for centuries. It is possible that American conflict scholars can learn something from them.<sup>1</sup> It is time to teach how other societies handle the problems that cross sovereign boundaries.

## II. WHY TEACH FAMILY LAW?

I have been astonished—and horrified—to learn in recent years that many conflicts professors do not teach the family law section of their conflicts casebook.<sup>2</sup> That lacuna astonishes me because family law issues raise enormously important (and interesting) public policy questions. For example, must a court have personal jurisdiction over both parents before it can enter a custody decree entitled to full faith and credit?<sup>3</sup> Family law conflicts issues are even more fun because they often involve areas considered well settled. Family law matters also provide a remarkably good review of issues covered in the jurisdiction and judgments parts of the course. For example, is the minimum contacts test satisfied when a state asserts personal jurisdiction over a man whose only contact with the forum is that the act of conception occurred (or may have occurred) there?

I am horrified that family law issues are not taught more widely in conflicts courses because this area is the one where

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1. Conflicts parochialism is particularly puzzling given the rich and sophisticated history of conflicts jurisprudence among the Dutch and the Italian city states.

2. If they don't teach family and international matters, how do they fill up three credits? Jurisdiction does not take very long because it is a reprise of first year civil procedure, and full faith and credit has long been settled law. That leaves choice of law, and how long can one really spend exploring the mysteries of the true conflict and the gospel according to St. Brainerd? Surely conflicts courses are not being filled out by learned discussions about multi-state estate planning or the pseudo-corporation doctrine.

3. See DAVID VERNON ET AL., CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS 732-36 (1990).

most American litigants and their lawyers are likely to encounter the insanities produced by our federal system of judicial government. The policy-makers that are trained in law school should be familiar with family law issues and their horrible consequences for United States citizens, especially the poor. Professors are also policy-makers, and obviously should be aware of these issues as well. Moreover, many litigators will encounter family law matters in practice, which means that they will also encounter interstate family law matters. Professors should prepare future litigators for this possibility. Finally, family law is one of the only areas in conflicts in which statutory solutions are important. It is useful for law students to study how legislative bodies have reacted to these complex problems.

Unfortunately, these legislative solutions are a primary reason why conflicts professors skip family law. Three major statutes must be mastered: the Uniform Reciprocal Enforcement of Support Act (URESA),<sup>4</sup> Uniform Child Custody Jurisdiction Act (UCCJA), and the Uniform Interstate Family Support Act (UIFSA).<sup>5</sup> The Parental Kidnapping Prevention Act (PKPA) should also be studied.<sup>6</sup> Academics just do not like complex statutes<sup>7</sup> and, as a result, often avoid teaching these family law statutes in conflicts courses.

### III. WHY TEACH INTERNATIONAL FAMILY LAW?

Because family and international law issues are very important, international family law issues should be taught in conflicts courses. To elaborate, international family law should be

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4. UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9B U.L.A. 553 (1958) [hereinafter URESA]. An amended and widely adopted version of URESA can be found at REVISED UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9B U.L.A. 381 (1968) [hereinafter RURES]. See generally INTERSTATE CHILD SUPPORT REMEDIES (Margaret C. Haynes & G. Diane Dodson eds., 1989).

5. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 115 (1968) [hereinafter UCCJA]. There is good news for the statute-phobic professor—the Uniform Interstate Family Support Act. UNIF. INTERSTATE FAMILY SUPPORT ACT, 9 U.L.A. 121 pocket part (1992) [hereinafter UIFSA]. Because so many states have adopted UIFSA, URESA really does not need to be taught anymore. An excellent description and analysis of UIFSA can be found in John J. Sampson, *Uniform Interstate Family Support Act (With Unofficial Annotations)*, 27 FAM. L.Q. 93 (1993) (Professor Sampson was a co-reporter of UIFSA).

6. Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1980).

7. Except for the tax professors—but they're probably not regarded as real academics anyway precisely because they focus on a code.

taught because the issues are important, liberating, cross-cultural, and just plain fun.

### A. *It's Important*

Family law disputes often do not seem interesting. To some, they lack the high drama of products liability cases. Family law matters can be very important, however. For example, unpaid child support obligations in the United States amount to many billions of dollars. The burden of the system's failure falls overwhelmingly on the poor and the helpless.

The importance of family law litigation skyrockets when the disputing parties cross national boundaries. The extraordinary expenses of international litigation—both in terms of travel and counsel fees—make it imperative that the court get it right the first time. There is no room for error; the parties do not have the resources to try again.

Avoiding error is primarily the responsibility of the lawyers and judges. Nevertheless, the training they (and their assistants) receive in law school classes can play a vital role in that endeavor. Teaching international family law, therefore, can help reduce, albeit in a small way, the sum of human misery.

### B. *It's Liberating*

International family law brings to the classroom problems that are free from the constraints imposed by the United States Constitution. This may be most noticeable when questions arise concerning recognition of judgments from foreign countries. The Full Faith and Credit Clause has taken almost all of the mystery out of those questions in United States litigation.<sup>8</sup> Getting a judgment from a foreign country recognized is a different matter, however. Divorce law provides an excellent example of this phenomenon.

For half a century it has been well settled that recognition must be given to a divorce rendered by a court in the United States with subject matter jurisdiction, that is, by a court in a state where one of the parties is domiciled.<sup>9</sup> Because domicile in this context has become virtually meaningless as anything other

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8. See generally William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994).

9. *Williams v. North Carolina*, 317 U.S. 287 (1942).

than a technical pleading requirement,<sup>10</sup> "suitcase divorces" have long been a fact of United States family law.<sup>11</sup>

The issues are not so clear, however, when the divorce is anything other than a divorce rendered in the United States. It is quite obvious that many courts in this country maintain their traditional hostility toward divorces granted to United States citizens by foreign tribunals. Freed from the shackles of the Full Faith and Credit Clause, American state courts became quite Victorian in their reactions to divorce. This reaction provokes fascinating discussion.

The distinction between "quickie" American divorces and "quickie" foreign divorces raises fundamental jurisprudential concerns in a context that facilitates good class discussion. Why should a Dominican Republic divorce be treated with less respect than one rendered in Delaware? Why should a state not extend comity to a foreign divorce? Should a state distinguish between foreign unilateral and bilateral divorces?<sup>12</sup> If public policy is the answer, what are the sources of this policy?<sup>13</sup> Why, in other words, should a foreign divorce be harder to enforce successfully than a domestic divorce? Would the result be different if the Dominican Republic were a rich and industrialized member of the "Group of Seven"? Many of these issues arise in the context of the "Incidental Question"; should those issues be treated differently? These are fun problems to explore.<sup>14</sup>

10. See, e.g., *Rymanowski v. Rymanowski*, 249 A.2d 407 (R.I. 1969) (person challenging foreign divorce bears heavy burden of proof). See generally E.H. Schopler, Annotation, *Recognition as to Marital Status of Foreign Divorce Decree Attacked on Ground of Lack of Domicile, Since Williams Decision*, 28 A.L.R.2d 1303 (1953).

11. See generally David Currie, *Suitcase Divorce in the Conflict of Laws*, 34 U. CHI. L. REV. 26 (1967)

12. The question here is whether a consenting respondent can waive, by his or her conduct, the requirement of domicile. The case law gives this question short shrift. But see *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953) (Hastie, J., dissenting), *vacated as moot*, 347 U.S. 610 (1954).

13. A great discussion vehicle is *Rosenstiel v. Rosenstiel*, 209 N.E. 2d 709 (N.Y. 1965), a rare case bucking the trend, in which the court ignored clear evidence of domestic policy in order to recognize a foreign divorce. The discussion of policy in the non-recognition cases is almost always non-existent. See, e.g., *Estate of Stepke*, 222 N.W. 2d 628 (Wis. 1974).

14. Choice of law in divorce recognition is another interesting topic. See, e.g., *Succession of Cohen*, 480 So.2d 1059 (La. App. 5th Cir. 1985); *Rosen v. Sitner*, 418 A.2d 490 (Pa. Super. 1980). Other fascinating issues include the availability of forum non conveniens in divorce, e.g., *Jagger v. Superior Court*, 96 Cal. App. 3d 579, 158 Cal. Rptr. 163 (Cal. Ct. App. 1979); and whether a state

Equally intriguing are questions involving aliens who are American domiciliaries and who wish to obtain a divorce in a United States court. Should the United States court entertain the action? Should it dismiss on forum non conveniens grounds? Is there any real difference between these cases and cases in which the petitioner is only technically domiciled in the forum?

### C. *It's Cross-Cultural*

A third reason to teach international family law is that it offers students a different perspective. Students and professors are exposed to different ways of doing things, ways that are strange and fun. Custody provides a good example.

United States custody law at one time was characterized by great judicial discretion that often took the form of hostility to custody decisions made elsewhere. Now, a sophisticated and well-elaborated statutory scheme, the UCCJA, controls interstate custody matters.<sup>15</sup> The UCCJA combines rules, discretion, and strong deference to the first court to obtain subject matter jurisdiction.<sup>16</sup>

International custody matters are governed by what is commonly known as the Hague Convention on International Child Abduction (Hague Convention).<sup>17</sup> The Convention takes a non-discretionary approach to enforcement: an outstanding custody order must be honored. One familiar with the history of child custody litigation in the United States might wonder how parochial United States courts will be in interpreting this strong mandate. How readily, in other words, will the few loopholes in this Convention be exploited to further the interests of United States parents? Will United States courts be as willing to return

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can divorce a resident alien, *e.g.*, *Abou-Issa v. Abou-Issa*, 189 S.E. 2d 443 (Ga. 1974).

15. See UCCJA, *supra* note 5.

16. *Id.*

17. Hague Convention on the Civil Aspects of International Child Abduction, 19 I.L.M. 1501 (1980). This Convention has been ratified by more than thirty states including the United States. The U.S. Congress' implementing legislation is found at International Child Abduction Remedies Act, 42 U.S.C. §§ 11601 *et seq.* (1989) [hereinafter ICARA]. See generally Linda J. Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9 (1994); Carol S. Bruch, *The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 FAM. L.Q. 35 (1994).

a child raised in the United States to Hungary as they would be to return a Hungarian child?

Many other fascinating questions can be raised. What effect does the Hague Convention have, for example, when a separate custody action is brought in the United States following a custody determination by a foreign court? Can a United States court exercise jurisdiction regarding the removal of a child from a foreign state? Or does the foreign decision "preempt" the exercise of jurisdiction by all United States courts?<sup>18</sup> Can a child be wrongfully removed from one state if the removal occurs before the courts of that state have acquired jurisdiction over the case?<sup>19</sup> What will happen when the existing custody order requires sending the child to a state that customarily denies due process or engages in practices that United States courts would deem abhorrent? What happens, as Linda Silberman writes, when the child will be returned to a lesbian couple in Denmark?<sup>20</sup> Or, as more states ratify the Convention, what if the child will be sent to a state where he or she will work full time as a rug weaver beginning at age eight?<sup>21</sup>

#### *D. It Enables Law Students to See Things From a Different Perspective*

The cross-cultural rewards of international family law do not require a literal border crossing; the subject also provides an illuminating insight into our own culture.

Teaching international family law often leads to reading texts written by non-conflicts scholars. Their comments on the collective efforts of conflicts scholars can be quite scathing. The leading textbook on family law, for example, makes this statement in a discussion about the recognition of foreign state divorces: "The cases recognizing these bilateral migratory divorces have been heavily criticized by scholars of the conflict of laws. Criticism may be justified from the viewpoint of conflict of laws

18. For one court's answer, see *L.H. v. Youth Welfare Office of Wiesbaden, Germany*, 568 N.Y.S. 2d 852 (Fam. Ct. 1991) (prior German ruling did not foreclose New York court from hearing cases; nevertheless, court found that it lacked jurisdiction under the UCCJA).

19. See *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993) (removal is wrongful if the first state is the "habitual residence" of the child under the Hague Convention).

20. See Silberman, *supra* note 17, at 32.

21. See generally *id.* at 31-34 (discussing similar hypotheticals).

theory, *whatever that may be*, but there is a more important consideration. . . ."<sup>22</sup> The closed world of conflicts scholars can be too self-congratulatory at times; it is useful to see conflicts as other do.

### E. For The Fun Of It

Wild and wacky problems are sometimes encountered in international family law. What is one to make of Dalig Singh Bir and his multiple wives?<sup>23</sup> Similarly, how does one comprehend the spectacle of United States courts recognizing, without a First Amendment shiver, divorces made by a rabbinical court?<sup>24</sup>

One sideshow involves the treaties entered into by the sovereign state of California with a number of foreign governments. California entered into these treaties with the tacit encouragement of the federal government, even though the spirit, and probably the language, of the United States Constitution forbids an "agreement" between a state and a "foreign power" without congressional consent.<sup>25</sup> California and other states have been driven to this extra-constitutional expedient by the disgraceful refusal of the federal government to address the terrible difficulties the United States federal system of governance imposes on the collection of child support across state and international borders.<sup>26</sup> The story is fascinating to tell in class (it's certainly a lot more fun than another guest statute case or yet another hypothetical about long-arm jurisdiction), and it addresses an increasingly common and vital subject.

Finally, consider the prospect of a Hague Convention on Inter-Country Adoption. This prospect raises a variety of interesting issues for discussion<sup>27</sup> involving basic policy. One proposed rule would permit the mother's consent, but only after

22. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 433 (2d ed. 1988) (emphasis added).

23. See *Estate of Bir*, 188 P.2d 499 (Cal. Ct. App. 1948).

24. See, e.g., *Miller v. Miller*, 128 N.Y.S. 787 (N.Y. Sup. Ct. 1911).

25. The story is well told in Gloria Folger DeHart, *Comity, Conventions, and the Constitution: State and Federal Initiatives in International Support Enforcement*, 28 FAM. L.Q. 89 (1994). Ms. DeHart is the genius behind this concept.

26. The situation is improving somewhat. See *id.* at 105-08. However, we still have a long way to go.

27. Hague Convention on Co-Operation in Respect of Intercountry Adoption, *final act* May 29, 1993, 32 I.L.M. 1134 (1993). Consent may not be "induced by payment or compensation of any kind." *Id.* ch. II, art. 4(c)(4).

birth.<sup>28</sup> How will this affect litigation in United States courts involving adoption made before the Convention, or involving a child from a non-signatory state?

One additional subject area that creates fascinating classroom discussion involves tribal courts. United States law accords Native American tribal courts a form of "sovereign" status.<sup>29</sup> This means, among other things, that decisions of tribal courts are entitled to full preclusive effect in other courts of the United States.<sup>30</sup> The interaction among tribal, state, and federal courts is a fascinating and virtually unexplored area of "international" law. Because of the large number of people involved, conflicting assertions of jurisdiction between tribal and state courts are a headache in family law. Unfortunately, this problem is rarely explored in either academic literature or the classroom.<sup>31</sup>

#### IV. A PEDAGOGIC CONCLUSION

Conflicts courses need to expose students to serious discussion of both international and family law. These issues are important, interesting, and provide a new perspective from which to examine the assumptions of United States conflicts laws. Better yet, this subject area offers terrific teaching material. Students really like these topics and they provide a particularly useful review at the end of the semester. Because they are so much fun, topics in international family law are really good for a class afflicted with end of the semester blues. So, go forth into the classroom and teach international family law; your students and your evaluations will benefit.

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28. See generally Peter H. Pfund, *Inter-Country Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L.Q. 53 (1994).

29. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). See also June Melvin Mickens, *Interaction Between State and Tribal Child Support Systems*, 6 AM. J. FAM. L. 185 (1992).

30. Assuming, of course, that the requisite jurisdictional findings have been made.

31. The American Bar Association has recently sponsored a set of model treaties concerning child support to be entered into by state and tribal governments. For a brief discussion of the recognition problems created by Native American divorces, see CLARK, *supra* note 22, at 420-21.