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Undermining *Kulko* at Home and Abroad

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UNDERMINING *KULKO* AT HOME AND ABROAD

JOHN J. SAMPSON*

*I. An Address to the Attendees of the Symposium***

A. Bob and Me

Thank you, ladies and gentlemen, students, professors, deans.

My talk is entitled “Undermining *Kulko* at Home and Abroad.” Before I begin, however, I'd first like to say something about “Bob and me.” That phrase makes me think of one of my favorite books from when I was a boy—*Ben and Me*.¹ I wishfully hoped that the book could mistakenly be thought to describe the relationship I have had with Bob Spector over the past fifteen years. The more I thought about it, though, the more I knew I was wrong. He certainly is the Ben Franklin in our relationship, but I am not the mouse. Rather, he was, and is, my mentor in international law; I am but his mentee in all things foreign.² Coincidentally, Gloria DeHart is here in the audience today to celebrate Bob's career; as he noted earlier, she was his mentor on this same subject.³ Further, she was the person who taught me on how to adapt the Uniform Interstate Family Support Act (UIFSA)⁴ to foreign law.

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** The material printed herein is a cleaned-up transcript of the talk Professor Sampson delivered at the Symposium.

1. ROBERT LAWSON, *BEN AND ME: AN ASTONISHING LIFE OF BENJAMIN FRANKLIN BY HIS GOOD MOUSE AMOS* (1939).

2. From 2003 through 2007 Professors Bob Spector and Jack Sampson served as “expert members” of the U. S. State Department delegation to The Hague Conference on Private International Law for the negotiation of the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance [the new Maintenance Convention].

3. Ms. DeHart, a child support enforcement lawyer with the Office of the California Attorney General, has been the leading advocate for enforcing international child support orders since at least the 1980's. For several years in the 1990's she led U.S. State Department delegations to foreign countries in negotiating bilateral agreements. Professor Spector accompanied her on two of those trips as a delegate. She also attended all of the sessions for the new convention, stretching over five years, as an observer for the International Bar Association, and participated fully in the discussions.

4. Various versions of UIFSA may be found by following hyperlinks from the NCCUSL website, at [http://www.nccusl.org/Act.aspx?title=Interstate%20Family%20Support%20Act%20Amendments%20\(2008\)](http://www.nccusl.org/Act.aspx?title=Interstate%20Family%20Support%20Act%20Amendments%20(2008))

B. *Undermining Kulko at Home*

I now turn to the subject of my talk, “Undermining *Kulko*”⁵ When you think about jurisdiction and family law, the most typical case likely to present a jurisdictional challenge is a middle class divorce suit between parties with kids living in separate states (or nations). In such a case, different rules of jurisdiction affect what the parties want. In general there are five things such a couple is likely to seek: (1) divorce; (2) property division; (3) alimony; (4) child custody; and (5) child support. Students and attorneys turn to the law to learn about jurisdiction for obtaining those objectives. For each of these objectives there are one or more different jurisdictional rules. When I tell law students this, they say “I’m amazed...that’s crazy.” I tell lawyers and they say “Damn, I wish I’d taken conflict of laws when I was in school.” And when I talk to judges and they say--well, they don’t say anything-- they just shake their heads in, what I interpret as despair.

My talk, however, does not cover all five of the objectives in a typical divorce; it only addresses the jurisdictional rules applicable to child support and alimony orders. In *Kulko v. Superior Court*, the U.S. Supreme Court essentially held that the State of California, in employing its jurisdictional statute, reached out its long arm too far. The Court reversed the case because it reasoned that under the facts it was inappropriate for California to assert personal jurisdiction over the father of the children.

I will recount those facts very briefly. The parties had divorced and lived in separate states. The mother lived in California, and the father and the two children initially lived in New York. One of the children, the daughter (about 12), wanted to go live with the mother. This was fine with the father, who bought her a “one-way plane ticket” and sent her on her way. Later the second child (a boy about 14) went to California in a less straightforward manner. It seems this time the mother sent the child an airplane ticket and somehow he went to California. There was no mention of exactly how he traveled to the airport, or boarded the plane by himself with the ticket the mother had furnished. Perhaps airlines were less attentive in those days, although that probably is a stretch (my guess is Dad happily drove him to the N.Y. airport—pure speculation).

These facts were found by the California courts to be sufficient to bind the father to their child support order, as well as to modify the original order. But these facts were not satisfactory to the majority of the Court in a 6-3 decision. And, Justice Marshall provided a relatively long list of

5. *Kulko v. Cal. Superior Ct.*, 436 U.S. 84, 98 S. Ct. 1690 (1978).

reasons why personal jurisdiction was lacking over the New York father. A full discussion of those reasons is beyond the scope of this particular talk, so I will not say more about them other than to note that the Court found under the uniform act involved, the Uniform Reciprocal Enforcement of Support Act (URESAs) and its revised version (RURESAs), the facts did not identify sufficient contacts with California for the Court to conclude the father knowingly was submitting to California jurisdiction.⁶ The California statute, as applied, accorded the deciding court virtually unlimited discretion because it granted jurisdiction “on any basis not inconsistent with the Constitution of this state or of the United States.” In other words, notice of the reach of the long arm statute was provided only to the judge and not to the litigants.

More fundamentally, the Court further reasoned that because the litigation involved a child support order, personal jurisdiction was a requirement. Cynically it could be argued this was because a child support order is for hard cash, rather than a status order involving such relatively mundane matters as custody and visitation. Arguably a trial court should not be able to fashion a child support order willy-nilly as they can with uncontested divorce cases

The major response to *Kulko* was for the Uniform Law Conference to draft another uniform act. Although it took more than a decade to formulate, the Uniform Interstate Family Support Act, UIFSA (1992), replaced URESAs and RURESAs, which had become old and tired after being in place for over forty years, and had never worked as well as was hoped. In any event, the Commissioners decided to start over. As an aside, I became a co-reporter in 1990 and joined in the effort to draft UIFSA thanks to presenting an argument to the drafting committee that URESAs needed a long-arm provision in order to undermine *Kulko*, indeed to get rid of *Kulko* and effectively make it a nonentity in family law. Of course, when addressing a constitutional decision by the Supreme Court through a new uniform state law the drafting must be done within the confines of the framework established by the Court. So despite my hyperbole, UIFSA should not be labeled as an attempt to “overrule” *Kulko*. Rather, it was

6. The classic summary is that Mr. Justice Marshall, held that: (1) acquiescence of divorced father who was a New York resident in his daughter's desire to live with her mother in California did not confer jurisdiction over divorced father in California courts in divorced mother's action to establish foreign judgment of divorce and to modify such judgment so as to award her child custody; (2) divorced father did not derive financial benefit as a result of his acquiescence in his daughter's desire to live in California with her mother so as to warrant California court's exercise of in personam jurisdiction over divorced father, and (3) basic considerations of fairness pointed decisively to New York as proper forum for adjudication of divorced mother's action to establish foreign judgment of divorce.

designed to change the law in such a way to achieve the desired goal of creating enforceable interstate child support orders by meeting the elements of the tests for personal jurisdiction the Supreme Court established in that case. To see how UIFSA achieves this, a quick review of the uniform law is appropriate to identify what it does. In short, the long-arm formulation was significantly expanded to create a particularized list of activities in order to sustain claims of personal jurisdiction. The nonparticularized version of California law was a major reason that the Supreme Court found that law wanting. So in drafting UIFSA the drafters created a list of specified acts to enable a state to assert personal jurisdiction over an absent support obligor. The following relatively short list, found in UIFSA section 201, totally undermines *Kulko*. UIFSA allows a state to exercise personal jurisdiction over a nonresident if:

- (1) the individual is personally served with [citation, summons, notice] within this state;
- (2) the individual submits to the jurisdiction of the state by consent in a record, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
- (3) the individual resided with the child in the state;
- (4) the individual resided in the state and provided prenatal expenses or support for the child;
- (5) the child resides in the state as a result of the acts or directives of the individual;
- (6) the individual engaged in sexual intercourse in the state and the child may have been conceived by that act of intercourse;
- (7) [the individual asserted parentage of a child in the putative father registry maintained in the state by the [appropriate agency]; or
- (8)] there is any other basis consistent with the constitutions of the state and the United States for the exercise of personal jurisdiction.⁷

Note that Subdivision (5) on the particularized list asserts that if a parent undertakes actions or directive that have an effect of causing a child to reside in another state, that provides a basis for the assertion of personal jurisdiction by the state where the child resides. Not surprisingly, this sounds approximately identical to the facts involved in *Kulko*.

In sum, the approach of UIFSA is to concede the correctness of the Supreme Court rationale, that is, it is necessary for a court to have personal jurisdiction in order to create, enforce, and to modify an order for child support. As an aside, the rest of the world disagrees with this conclusion,

7. UNIF. INTERSTATE FAMILY SUPPORT ACT § 201, 9.IB U.L.A. 35 (2008), available at http://www.law.upenn.edu/bll/archives/ulc/uifsa/UIFSA_Final_08.pdf.

which will be briefly discussed *infra*. In essence UIFSA is a very comprehensive uniform act. In fact, it is comprehensive enough and popular enough to be in force in every U.S. jurisdiction, something very unusual for a uniform act, albeit currently present in one of three versions, i.e., 1996, 2001, or 2008.

What makes the extreme popularity of UIFSA understandable is that the U.S. Congress has stated, in effect, that if the state governments want millions of dollars in subsidies to enforce child support orders, the state legislatures must pass UIFSA.⁸ Congress provides a lot of money for this project, and has determined for enforcement of child support to function properly across state lines the only way it's going to work is to be able to enforce a New York child support order in California, even though the father's only act in that regard was to send a child to California. That action is very similar to all sorts of other types of actions that cause personal jurisdiction to a person who sets something loose in interstate commerce, such as a single insurance policy.⁹ Thus, if an individual sets a child loose in interstate commerce, so to speak, he will be understood to have agreed to pay child support where the child resides. The act will cause you to be subject to the personal jurisdiction of the recipient state. That's the undermining of *Kulko* at home, i.e., in the eight different ways in the provisions of UIFSA Section 201.

C. Undermining Kulko Abroad

The new convention promulgated by the Hague Conference on International Private Law to enforce child support across international

8. The relevant federal law, known as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 42 U.S.C.A. § 666(f), states,

(f) Uniform Interstate Family Support Act. In order to satisfy section 654(20)(A) of this title, on and after January 1, 1998, each State must have in effect the Uniform Interstate Family Support Act, as approved by the American Bar Association on February 9, 1993, and as in effect on August 22, 1996, including any amendments officially adopted as of such date by the National Conference of Commissioners on Uniform State Laws.

Id.

In fact, UIFSA (2001) conforms to the law thanks to waivers routinely granted by the Office of Child Support Enforcement, Administration of Children and Families (ACF), HHS. See <http://www.acf.hhs.gov/programs/cse/index.html>. The plan is for the revised version of UIFSA (2008), which takes the new Hague Convention into account, will be substituted in new federal enabling legislation in order to put the convention into force. See *Symposium on International Enforcement of Child Support*, 43 FAM. L. Q. *passim* (Spring 2009).

9. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957). Admittedly the *Kulko* opinion cited *McGee*, but did not acknowledge the analogy.

borders was signed on its day of promulgation by only one country, the United States. This was the first step in the long, tortuous procedure of putting a treaty into effect in the United States. The current status of the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance is found in the Appendix to this transcript.

UIFSA initially did not give much thought to international issues in its original 1992 version. For the 1996 version, drafted a short four years later, Gloria DeHart was invited to the table. Her interest was to correct that oversight and have the interstate act begin to take into account international orders. Ultimately, she persuaded the U.S. State Department, the Uniform Law Commission, and Congress to deal with international support orders as well as interstate orders.

That interest progressed steadily from 1996 to 2011, where we are now. The United States has a number of agreements with other countries on international child support enforcement. Individual states have agreements with foreign countries, which is also authorized. For example, decades ago Texas made an agreement with Germany to enforce German orders, and Germany has responded by enforcing Texas orders. That's the system now, but not an ideal method. The new Hague Convention posits there ought to be a universal international agreement.¹⁰ The U.S. Senate has already given its advice and consent, contingent on a number of factors. When the new convention does go into effect it will be via state law. In this process Congress will say "pass UIFSA 2008" which is written to incorporate not just the current way of doing things, but also the future way of doing things.

The last thing to explain is why *Kulko* must be undermined abroad as well to make the system function. This is necessary internationally because, lo and behold, the United States is the only country that requires personal jurisdiction to establish, enforce, and modify child support obligations of a parent. What is needed to answer the jurisdictional question to establish and enforce child support in virtually all other countries is "does the child live here?" That's not our way, so in the new maintenance convention other countries have agreed that we can do it our way, and we have agreed that they can do it their way. Now the little wrinkle here is that when other countries establish child support, we accept that process with a stipulation, to wit, the other country must have acted under the required fact situations that would yield personal jurisdiction under U. S. law.¹¹ U.S. child support orders sent to other nations certainly should not have any problem with

10. The Convention is not exactly new since its fourth birthday is November 23, 2011.

11. The most readily available explanation of this complex drafting challenge is found in the Symposium issue cited in *supra* note 7, at 139-58.

being enforced. Even though we require personal jurisdiction, in virtually every case the child support order will come from a forum where the obligor or the child reside. Obviously the person seeking child support is almost always the individual who has actual custody of the child. It can be agreed it is virtually unheard of for an obligee to seek to obtain child support order when the child is living with someone else in another country, or the obligor is not living in the forum. Similarly, in foreign countries it's virtually certain that there will be some direct contact between the parties and the forum because UIFSA takes such a broad view of what constitutes personal jurisdiction. This broad view will be found in the facts in France, Germany, or whatever other country is actually bound by the convention. Those facts will fit our system of finding the contacts which warrant the establishment and enforcement of the child support order (or other order of family maintenance).

APPENDIX A

*A Status Update Regarding Ratification of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance**

United States

Submitted by Vicki Turetsky in August 2010 and updated October 12, 2010
Commissioner
Office of Child Support Enforcement
US Department of Health and Human Services
Washington, DC

The United States signed the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance on November 23, 2007, moments after its adoption by The Hague Conference on Private International Law. The U.S. was the first country to sign, signaling the executive branch's intention to bring the treaty into force under U.S. domestic law. Since then major steps have been taken.

The Uniform Interstate Family Support Act (UIFSA) was determined to be the most effective mechanism of integrating the Convention into state law. First promulgated seventeen years ago, UIFSA has been enacted in every state, pursuant to the requirements of 42 U.S.C. § 666(f). It is well understood by judges, lawyers, and child support professionals and already addresses some international child support matters. The National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission (ULC), had been engaged in Convention discussions and agreed to draft UIFSA amendments for the limited purpose of implementing Convention requirements. The ULC drafting committee welcomed active participation by many child support professionals, including the Office of Child Support Enforcement (OCSE) and the Department of State. Acting on an expedited basis, the ULC Commissioners approved the UIFSA amendments in July 2008. The American Bar Association's House of Delegates approved UIFSA 2008 in February 2009.

Implementing legislation, including updating the UIFSA mandate in federal law to UIFSA 2008, was submitted to the Congress soon after the ULC acted. On September 8, 2008, President Bush transmitted the Convention to the Senate asking for its advice and consent to ratification. The Conference of Chief Justices, the Conference of Court Administrators, ULC, ABA, NCSEA, and other child support

* NCSEA CHILD SUPPORT COMMUNIQUÉ January 2011 Message (HTML) www.ncsea.org.

organizations urged approval. Over the next year, OCSE and State Department staff conducted several briefings for Foreign Relations Committee staff.

The Senate Committee on Foreign Relations held a hearing on the Convention on October 6, 2009. Mr. Keith Loken, Assistant Legal Adviser, Department of State; the Honorable Battle Robinson, Uniform Law Commissioner and Retired Judge in the Family Court of Delaware; Ms. Alisha Griffin, Assistant Director, Office of Child Support Services, New Jersey Department of Human Services; and I were among those testifying. On November 17, 2009, the Committee voted to approve the Convention.

On September 29, 2010, the United States Senate approved the Resolution of Advice and Consent regarding the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

Now that the full Senate has taken action, the following additional steps must occur before the Treaty can enter into force for the United States:

The Congress must adopt, and there must be enacted, implementing legislation for the Treaty. The Department of Health and Human Services already has submitted draft implementing legislation and will provide support in moving that legislation forward.

Pursuant to the implementing legislation, all states must enact UIFSA 2008 by the effective date noted in the legislation. The draft legislation currently gives states two years to pass new state laws. In addition, the draft legislation requires states to make minor revisions to the state plan.

The President must sign the instrument of ratification for the Treaty.

Finally, after all these activities are completed, the United States will be able to deposit its instrument of ratification with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, which is the depositary for the Treaty.

If at least one other country has deposited its instrument of ratification, acceptance or approval, the Treaty will enter into force for the United States on the first day of the first month that is not less than three months after the date of the U.S. deposit. If the United States is the first country to deposit its instrument, the Treaty will enter into force on the first day of the first month that is not less than three months after a second country deposits its instrument.