**Globalization of Family Mediation Rooted in Children’s Rights**

By

Maureen Dabbagh

© 2013

Preface

 Family conflict involving child custody disputes across international borders may be settled using international mediation. The ability to mediate access as soon as a child is wrongfully removed or retained by a parent across international borders allows the child to enjoy contact with a parent while other processes, such as litigation, are at work as well as to protect the child’s right to have visitation to a non-custodial or residential parent after. The globalization of family law now includes standards and guidelines for international family mediation. Unlike traditional family mediation developed within the context of court- annexed style family mediation rooted in family law codes, international family mediation developed within the context of international family law recognizing the rights of children. The Hague Conference on Private International Law (HccH) used the principles found in the United Nations Convention on the Rights of the Child (UNCRC) in framing international family mediation. 2012 introduced the first guide defining the standards for cross border family mediators.

International Legal Framework

 The Hague Conference on Private International Law (HccH), seeks to bridge gaps between the many different legal traditions around the world. It is considered to be the center for international judicial and administrative co-operation in the area of private law as it relates to the protection of the family and children (HccH). This is accomplished through the development and operation of international treaties, conventions, and best practices that address issues of marriage, divorce, maintenance obligations, and the protection of children. A decade after the Hague Permanent Bureau on Private International Law drafted the Hague Convention on the Civil Aspects of International Child Abduction the United Nations drafted a treaty concerning the rights of the child (UNCRC, 1989).

International Human Rights Influence

 Cross border family mediation is an extension of globalized family law aimed at addressing the unique needs of millennial families. It is a direct response to social globalization (World Commission, 2003). Millennial families increasingly marry outside of their nationality, ethnicity, citizenships, religious affiliations, and race. Bi-cultural couples present complex family dynamics when parents differ on child-rearing notions. The rate of divorce in bicultural marriages is higher than in mono-cultural marriages, and the rate of bi-cultural marriages continues to grow (Donovan, 2004).

 The dynamics of families involved in international child custody disputes most often include parents originating from a different country, culture, or nationality. International litigation processes have not routinely provided the child with continued access to their left behind parent during or after legal decisions have been made. In order to provide the child with relief, the HCCH created a working party to examine the potential use of mediation as a means for remedy. The focus was on providing an immediate response to access disputes. It is through the international treaty titled The Hague Convention on the Civil Aspects of International Child Abduction that the globalization of family mediation sprouted. International family mediation focuses on the child’s rights by bridging gaps between different cultural legal and traditions and allows parents to voluntarily resolve their disputes in a forum supported by a neutral third party mediator with a view to provide enforcement of the party’s agreement in multiple jurisdictions.

 Unlike the Hague Convention on the Civil Aspects of International Child Abduction, the United Nations Convention on the Rights of the Child stressed the duties of nations to help families care for and protect the child. It operates from a view of non-discrimination, best interests of the child, survival and development, and the views of the child. Addressing the many different rights recognized for children, it is articles 9 and 10 of the UNCRC that specifically address a child’s rights when separated from their parent by international borders (UNCRC).

* “States Parties shall ensure that a child shall not be separated from his or her parents against their will, or one where the parents are living separately and a decision must be made as to the child's place of residence…
* States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests…
* A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents...
* States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention. ”

The Child’s Right to Speeding and Continuous Contact

 The principles defined in the UNCRC are supported by the Hague Bureau on Private International Law. Hague general principles direct Central Authorities *(Offices overseeing the implementation and enforcement of the Hague Convention on the Civil Aspects on International Child Abduction)* handling parental abduction cases thusly, “All possible steps should be taken to secure the rights of children to maintain personal relationships and have regular contact with both of their parents and of parents to maintain personal relationships and have regular contact with their children, unless it is determined that such contact is contrary to the interests of the children (Trans-frontier, 2008).” Children experiencing their wrongful removal or retention across international borders are not only denied access to their parent in the initial stages of their parents conflict, but they often experience denial of access after Hague litigation. Whether the court determines that the child should be sent back to their home of habitual residence or not, the child is not protected in a manner that would allow them the continued contact with both parents.

 In their continuous work on family and child protection issues, the Hague Bureau on Private International Law has developed a series of best practices guides for Central Authorities. These guides are specific regarding the rights of the child to have contact with their parents no matter what stage of litigation they may be in. The good practices guide on trans-frontier recognizes that children have the right to contact with their left behind parent when (Trans-frontier, 2008):

* “an interim order for contact is sought by an applicant pending a decision on the return of the child…
* cases in which contact arrangements are sought (for example, by the abducting parent) in the country to which the child has been returned
* where return is refused, in the country to which the child has been taken…”

 In keeping with the ideals presented in the UNCRC, Central Authorities are now encouraged to act with haste to support immediate contact between a child and parent. “Authorities should act with due speed in processing applications to establish, enforce or modify decisions concerning contact. Speed is particularly important in cases where contact with a parent is currently disrupted. Delay in restoring a disrupted parent/child relationship may have serious consequences for the child. Moreover, the longer the period of disruption, the more difficult it becomes to re-establish contact without special measures to assist reintegration (Trans-frontier, 2008).”To this end the 2011 Special Commission recognized that (Special, 2011):

* “…Pursuant to Articles 7(2) b) and 21 of the 1980 Convention, during pending return proceedings a requested Contracting State may provide for the applicant in the return proceedings to have contact with the subject child(ren) in an appropriate case. ”

Mediation as a Remedy in Access Issues

 As some nations move forward to implement international family mediation programs designed to provide a fast and cost effective way for parents to voluntarily craft their own solutions, other nations recognize they face social resistance. The Trans-frontier guide on good practices suggests a process in which contact can be established without imposing long waits experienced when litigating, and encourages the parents to work together to investigate and craft their own access agreement. This ideal is expressed within the context of alternative dispute resolution (Trans-frontier).

* “Agreed solutions should be facilitated and encouraged by mediation, conciliation, negotiation and similar means…
* An agreement based on mediation which is intended by the parties to be legally binding should be made enforceable in both States concerned...
* This also applies to agreements achieved through other means of alternative dispute resolution…
* Set limits to the circumstances in which an existing contact order may be modified…
* Includes advance recognition of a contact or custody decision in any country to which the child will travel, whether in the context of relocation, or for the purpose of visiting the non-custodial parent or for other purposes…
* The Central Authority should act as the focal point for removing obstacles to the exercise of contact rights…
* In the context of abduction or alleged abduction, this includes cases where an interim order for contact is sought by an applicant pending a decision on the return of the child, as well as cases in which contact arrangements are sought (for example, by the abducting parent) in the country to which the child has been returned or, where return is refused, in the country to which the child has been taken…
* Safeguards that support the respect of agreements that a child will not be wrongfully removed by a parent during access contact are also supported by best practices and include supervision by a professional or family member.”

 Deep rooted legal and cultural traditions regarding parental rights and child custody ideas may be clash with initiatives that recognize children’s rights. “International human rights law plays a growing role in mediating these competing norms (Stark, 2006).” The design of international family mediation considers the complex dilemmas of culture, while focusing on the best interest of the child. Intimate family traditions and practices ranging from children sleeping in a family bed to beast ironing, forced religious conversion, child marriage, forced circumcision (male and female), gavage, honor killing, polygamy, and a host of other practices found in both western and non-western cultures are not uncommon conflict issues found in abducting families. These challenge the notions of even the most skilled mediator as practices may hold conflicting legal status in the jurisdictions of each parent.

 To this end the Child Abduction Section of The Hague Conference on Private International Law created a Working Party within the context of the “Malta Process” developed and published the first professional standards and best practices for international family mediation. The publication of the Mediation: Guide to Good Practice was made available in December of 2012 (Mediation, Guide 2012). It was crafted to address the unique characteristics found in families separated by international borders. It is not traditional family mediation. “In view of the particular nature of mediation in international child abduction cases, only experienced family mediators preferably having received specific training for international family mediation and, more specifically, mediation in international child abduction cases should conduct mediation in such cases (Mediation, Guide).” While the guide identifies professional knowledge, ethics, responsibilities, and aims, it does not define any specific mediation process *(i.e. facilitative, evaluative, narrative, and transformative).*

 Family mediators quickly come to appreciate the differing expert opinions on the best ADR approaches for these cases. Its international nature infused with human rights recognitions lends it behavior quit differently than traditional court-annexed family mediation. Competing legal traditions that they have resisted efforts to create legal bridges in family law demonstrate the same competing nature in mediation processes. Acknowledging the critical cultural influences in international family disputes, The Cross Border Mediation Standards and Guides includes language which addresses this by recognizing mediation and other ADR process in providing remedy for international family disputes.

Conclusions

 The globalization of family law and mediation as an extension of international private law reflects the increasing awareness of human rights and protections of individual rights. Careful and thoughtful mediation processes consider individual rights and provides balanced outcomes within the legal framework in which mediated agreements, settlements, or memorandums of understanding are to be submitted for enforcement. Cross border family mediation is still in its infancy. As globalization leads to a greater awareness, understanding, and acceptance of human rights within the context of mediation, I am reminded of a quote by attorney-mediator, David A. Hoffman, an instructor at the Harvard law school, and advocate for a more eclectic model who said, "Mediation requires responsiveness to the parties’ needs, interests, abilities, and unique circumstances. Tailoring the mediation process involves more art than science… (Hoffman, 2011).

Bibliography

Donovan, Sarah. “Stress and Coping Techniques in Successful Intercultural Marriages.” Master’s thesis, Virginia Tech, 2004. <http://scholar.lib.vt.edu/theses/available/etd-12222004-125301/unrestricted/thesis.pdf>.

HccH. Hague Conference on Private International Law. Hague Netherlands. http://www.hcch.net/index\_en.php?act=text.display&tid=26

Hoffman, D. A. (2011). Mediation and the art of shuttle diplomacy. Negotiation Journal, 10.1111(j.1571- 9979.2011.00309.x. July 2011), 263-309.(1)

Mediation: Guide to good practice under the Hague convention of 25 October 1980 on the civil aspects of international child abduction. (2012). Hague, Netherlands: The Hague Convention on Private International Law, Permanent Bureau. Retrieved from <http://www.hcch.net/upload/guide28mediation_en.pdf>

Special Commission Conclusions and Recommendations adopted by the Special Commission. Special Commission on the practical operation of 1980 and 1996 Hague Conventions. Hague Conference on Private International Law. June 1-10, 2011. Annex 4 iii

Stark, B. (2006) When globalization hits home: International family law comes of age. Vanderbilt Journal of Transnational Law, 39:1551. Retrieved from http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Stark.pdf

Trans-frontier contact concerning children (2008): General principles and a guide to good practices. (ISBN 978 1 84661 1414 ed.). Bristol: Family Law, A publishing imprint of Jordan Publishing Limited. Retrieved from http://www.hcch.net/upload/guidecontact\_e.pdf

UNCRC. Human Rights Commission, Office of Legal Affairs. (1989). Convention on the rights of the child (Treaty Series , vol. 1577, p. 3). Retrieved from United Nations website: <http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en>

World Commission on the Social Dimensions of Globalization. United Nations, (2003). The social dimension of globalization. Retrieved from International Labour Organization website: <http://www.ilo.org/public/english/wcsdg/globali/globali.htm>